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Federal Register
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Thursday, July 17, 2003

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–SW–49–AD; Amendment 39–13238; AD 2003–14–19]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model SA–365N, N1, AS–365N2, AS 365 N3, SA–366G1, AS355F, F1, F2, N, and EC130 B4 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Eurocopter France (Eurocopter) model helicopters that requires removing certain main servocontrols and replacing them with servocontrols that do not fall within the ''Applicability'' of this AD at specified intervals. This amendment is prompted by the discovery of an incorrect tightening torque load found on servocontrols that were overhauled by Hawker Pacific Aerospace. The actions specified by this AD are intended to prevent thread failure, separation of the upper end fitting that attaches the servocontrol cylinder to the upper ball end-fitting, and subsequent loss of control of the helicopter.

DATES: Effective August 21, 2003.

FOR FURTHER INFORMATION CONTACT: Uday Garadi, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0110, telephone (817) 222–5123, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for Eurocopter Model SA–365N, N1, AS–365N2, AS 365 N3, SA–366G1, AS355 F, F1, F2, N, and EC130 B4 helicopters with certain servocontrols installed was published in the **Federal Register** on February 14, 2003 (68 FR 7451). That action proposed to require removing the servocontrol and replacing it with a servocontrol that does not fall within the ''Applicability'' of the AD at specified intervals.

The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on Eurocopter Model AS 365 N, EC 130, AS 355, and SA 366 helicopters. The DGAC advises of a report of incorrect tightening torque load found in service on servocontrols that were overhauled by Hawker Pacific Aerospace.

Eurocopter has issued the following alert telexes, all dated April 29, 2002, which specify removing the servocontrols and returning them to the Hawker Pacific Aerospace:

- Alert Telex No. 67.00.08 for Model AS–365N, N1, N2, and N3 helicopters;
- Alert Telex No. 67.03 for Model AS–366G1 helicopters;
- Alert Telex No. 67.00.23 for Model AS355F, F1, F2, and N helicopters;
- Alert Telex No. 67A001 for Model EC130 B4 helicopters.

The DGAC classified these alert telexes as mandatory and issued AD No's. 2002–312–056(A), 2002–313–027(A), 2002–315–069(A), and 2002–316–004(A), all dated June 12, 2002, to ensure the continued airworthiness of these helicopters in France.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's AD system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. However, for clarity and consistency in this final rule, we have retained the language of the NPRM regarding that material.

The FAA estimates that 252 helicopters of U.S. registry will be affected by this AD, that it will take approximately 8 work hours per helicopter to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $6,853, but the manufacturer has stated in the service information that it will rework the servocontrols at no cost to the owner/operator. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $1,847,916, assuming no costs are covered by the manufacturer's warranty.

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2003–14–19 Eurocopter France: Amendment 39–13238. Docket No. 2002–SW–49–AD.

Applicability: Model SA–365N, N1, AS–365N2, N3, SA–366 G1, AS355F, F1, F2, N and EC130 B4 helicopters, with TRW-SAMM main servocontrols, part number SC8031, SC8031A, SC8031–1, SC8031–2, SC8032–1, SC8032–2, SC8033–1, SC8033–2, SC8034–1, SC8034–2, SC8042 or SC8043, overhauled or repaired at Hawker Pacific Aerospace before March 1, 2002, installed, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent thread failure, separation of the upper end-fitting that attaches the servocontrol cylinder to the upper ball end-fitting, and subsequent loss of control of the helicopter, accomplish the following:

(a) Replace each servocontrol with a servocontrol that does not fall within the ''Applicability'' of this AD in accordance with the following table:

For servocontrols that have been in service for:	Replace the servocontrols:
(1) Less than 1,000 hours time-in-service (TIS)	Within the next 550 hours TIS or 12 months, whichever occurs first.
(2) 1,000 or more hours TIS; less than 1,300	Before the servocontrols reach 1,550 hours TIS or within 9 months, whichever occurs first.
(3) 1,300 or more hours TIS;	Within the next 250 hours TIS or 6 months, whichever occurs first.

Note 2: Eurocopter Alert Telex No. 67.00.08 for Model AS 365 N, N1, N2, and N3 helicopters; Alert Telex No. 67.03 for Model AS 366 G1 helicopters; Alert Telex No. 67.00.23 for Model AS 355 F, F1, F2, and N helicopters; and Alert Telex No. 67A001 for Model EC 130 B4 helicopters, all dated April 29, 2002, pertain to the subject of this AD.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Safety Management Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Safety Management Group.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Safety Management Group.

(c) Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the requirements of this AD can be accomplished.

(d) This amendment becomes effective on August 21, 2003.

Note 4: The subject of this AD is addressed in Direction De L'Aviation Civile (France) AD No's. 2002–312–056(A), 2002–313–027(A), 2002–315–069(A), and 2002–316–004(A), all dated June 12, 2002.

Issued in Fort Worth, Texas, on July 8, 2003.

Mark R. Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 03–17947 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–20–AD; Amendment 39–13242; AD 2003–14–23]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211–524G2, –524G2–T, –524G3, –524G3–T, –524H, –524H–T, –524H2, and –524H2–T Series, and Models RB211 Trent 768–60, 772–60, and 772B–60 Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls-Royce plc (RR) RB211–524G2, –524G2–T, –524G3, –524G3–T, –524H, –524H–T, –524H2, and –524H2–T series, and models RB211 Trent 768–60, 772–60, and 772B–60 turbofan engines with high pressure compressor (HPC) rotor stage 1 through stage 6 drums, part numbers (P/Ns) FK25502 and FW20195 installed. This AD is prompted by reports of cracks found in loading slots of HPC rotor stage 1 through stage 6 drums. We are issuing this AD to prevent crack initiation and propagation leading to uncontained failure of the HPC rotor stage 1 through stage 6 drum, and damage to the airplane.

DATES: Effective August 1, 2003.

We must receive any comments on this AD by September 15, 2003.

ADDRESSES: Use one of the following addresses to submit comments on this AD:

- By mail: The Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–NE–20–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail: *9-ane-adcomment@faa.gov*

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Antonio Cancelliere, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7751; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The Civil Aviation Authority (CAA), which is the airworthiness authority for the U.K., recently notified the FAA that an unsafe condition may exist on RR RB211–524G2, –524G2–T, –524G3, –524G3–T, –524H, –524H–T, –524H2, and –524H2–T series, and models RB211 Trent 768–60, –772–60, and 772B–60 turbofan engines with HPC stage 1 through stage 6 drums, P/Ns FK25502 and FW20195 installed. The CAA advises that reports have been received of a number of RR Trent 700 series HPC rotor stage 1 through stage 6 drums found with cracks in the blade loading slots. The RB211–524G2, –524G2–T, –524G3, –524G3–T, –524H, –524H–T, –524H2, and –524H2–T series turbofan engines use an identical HPC rotor stage 1 through stage 6 drum. To date, one drum has been found with cracks. The manufacturer's investigation has revealed that the mechanism inducing

the cracking is a function of engine operating time and temperature, and is initiating cracks in the area of peak stress location. This AD requires removal from service of affected HPC rotor stage 1 through stage 6 drums at a newly established reduced cyclic life limit. We are requiring certain actions in this AD to prevent crack initiation and propagation leading to uncontained failure of the HPC rotor stage 1 through stage 6 drum, and damage to the airplane.

FAA's Determination and Requirements of This AD

Although none of these affected engine models are used on any airplanes that are registered in the United States, the possibility exists that the engine models could be used on airplanes that are registered in the United States in the future. Since an unsafe condition has been identified that is likely to exist or develop on other Rolls-Royce plc RB211–524G2, –524G2–T, –524G3, –524G3–T, –524H, –524H–T, –524H2, and –524H2–T series, and models RB211 Trent 768–60, 772–60, and 772B–60 turbofan engines of this same type design, we are issuing this AD to prevent crack initiation and propagation leading to uncontained failure of the HPC rotor stage 1 through stage 6 drum, and damage to the airplane. This AD requires removal of HPC rotor stage 1 through stage 6 drums, P/Ns FK25502 and FW20195, at a newly established reduced cyclic life limit of 4,200 cycles-since-new.

Bilateral Airworthiness Agreement

This engine model is manufactured in the U.K., and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. In keeping with this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. We have examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination of the Effective Date

Since there are currently no domestic operators of this engine model, notice and opportunity for prior public comment are unnecessary. Therefore, a situation exists that allows the immediate adoption of this regulation.

Changes to 14 CFR Part 39—Effect on the AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs our AD system. This regulation now includes material that relates to special flight permits, alternative methods of compliance, and altered products. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. 2003–NE–20–AD'' in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it. If a person contacts us through a nonwritten communication, and that contact relates to a substantive part of this AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications with you. You may get more information about plain language at *http://www.plainlanguage.gov*.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''AD Docket No. 2003–NE–20–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2003–14–23 Rolls-Royce plc: Amendment 39–13242. Docket No. 2003–NE–20–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective August 1, 2003.

Affected ADs

(b) None.

Applicability:

(c) This AD applies to Rolls-Royce plc RB211–524G2, –524G2–T, –524G3, –524G3–T, –524H, –524H–T, –524H2, and ''524H2–T series, and models RB211 Trent 768–60, 772–60, and 772B–60 turbofan engines with high pressure compressor (HPC) rotor stage 1 through stage 6 drums, part numbers (P/Ns) FK25502 and FW20195 installed. These engines are installed on, but not limited to, Airbus A330 series, Boeing 747–400 series, and 767–300 series airplanes.

Unsafe Condition

(d) This AD is prompted by reports of cracks found in loading slots of HPC rotor stage 1 through stage 6 drums. We are issuing this AD to prevent crack initiation and propagation leading to uncontained failure of the HPC rotor stage 1 through stage 6 drum, and damage to the airplane.

Compliance:

(e) If you have not already performed the actions required sby this AD, you must

perform the actions within the compliance cycles specified in this AD.

Required Actions

(f) Remove HPC rotor stage 1 through stage 6 drums, P/Ns FK25502 and FW20195, from service at or before accumulating 4,200 cycles-since-new (CSN).

(g) After the effective date of this AD, do not install any HPC rotor stage 1 through stage 6 drum, P/N FK25502 or FW20195, that exceeds 4,200 CSN.

Alternative Methods of Compliance (AMOCs)

(h) You must request AMOCs as specified in 14 CFR part 39.19. All AMOCs must be approved by the Manager, Engine Certification Office, FAA.

Material Incorporated by Reference

(i) None.

Related Information

(j) CAA airworthiness directive 004–02–2003, dated April 2003, also addresses the subject of this AD.

Issued in Burlington, Massachusetts, on July 11, 2003.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–18078 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–32–AD; Amendment 39–13243; AD 2003–15–01]

RIN 2120–AA64

Airworthiness Directives; McCauley Propeller Systems, Inc. Propeller Hub Models B5JFR36C1101, C5JFR36C1102, B5JFR36C1103, and C5JFR36C1104

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain McCauley Systems, Inc. propellers that are installed on BAE Systems (Operations) Limited Jetstream Model 4101 airplanes. This AD requires a fluorescent penetrant inspection (FPI) of the propeller blades for cracks. This AD is prompted by a report of a significant crack in a propeller blade shank and two reports of cracks in the hubs of the same propeller model. We are issuing this AD to detect cracks in the propeller blade shank that could cause a failure of the propeller blade and loss of control of the airplane.

DATES: Effective July 17, 2003. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of July 17, 2003.

We must receive any comments on this AD by September 15, 2003.

ADDRESSES: Use one of the following addresses to submit comments on this AD:

- *By mail:* The Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–NE–32–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- *By fax:* (781) 238–7055.
- *By e-mail: 9-ane-adcomment@faa.gov*

You may get the service information referenced in this AD from McCauley Propeller Systems, 3535 McCauley Drive, Vandalia, OH 45377.

You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Timothy Smyth, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Room 107, Des Plaines, IL 60018; telephone: (847) 294–7132; fax: (847) 294–7834.

SUPPLEMENTARY INFORMATION: This AD applies to the following McCauley Systems, Inc. propeller assemblies that are installed on BAE Systems (Operations) Limited Jetstream Model 4101 airplanes:

- Hub Model B5JFR36C1101, with Model 114GC series propeller blades,
- Hub Model C5JFR36C1102, with Model L114GC series propeller blades, and
- Hub Model B5JFR36C1103, with Model 114HC series propeller blades,
- Hub Model C5JFR36C1104, with Model L114HC series propeller blades.

This AD requires a one time FPI of the retention area of the propeller blade. A July 1, 2003, report of vibration prompted this AD. An operator of a Jetstream Model 4101 airplane notified McCauley Propeller Systems, Inc. of a vibration during flight. Investigation found a crack that appeared to extend through the butt of the propeller blade for about one-half of the circumference of the blade shank. We also received two reports of cracks in the hubs of the same propeller models that may be related to this issue. We are requiring the actions specified in this AD to detect cracks in the propeller blade shank that could cause a failure of the propeller blade and loss of control of the airplane.

Relevant Service Information

We have reviewed and approved the technical contents of McCauley Alert Service Bulletin (ASB) ASB246B, Revision 2, dated July 11, 2003, that describes procedures for FPI of the propeller blade.

Differences Between This AD and the Service Information

McCauley ASB ASB246B, Revision 2, dated July 11, 2003, requires the operator to perform a blade shake check at 72-hour intervals. This AD does not require the blade shake check.

FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other McCauley Systems, Inc. propeller hub Models B5JFR36C1101, C5JFR36C1102, B5JFR36C1103, and C5JFR36C1104, of the same type design that are installed on BAE Systems (Operations) Limited Jetstream Model 4101 airplanes. We are issuing this AD to detect cracks in the propeller blade shank that could cause a failure of the propeller blade and loss of control of the airplane. You must use the service information described previously to perform these actions.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Changes to 14 CFR Part 39—Effect on the AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs our AD system. This regulation now includes material that relates to special flight permits, alternative methods of compliance, and altered products. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Interim Action

These actions are interim actions and we may take further rulemaking actions in the future.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include ''AD Docket No. 2003–NE–32–AD'' in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it. If a person contacts us verbally, and that contact relates to a substantive part of this AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications with you. You may get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.gov.*

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''AD Docket No. 2003–NE–32–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2003–15–01 McCauley Propeller Systems, Inc.: Amendment 39–13243. Docket No. 2003–NE–32–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 17, 2003.

Affected ADs

(b) None.

Applicability

(c) This AD applies to McCauley Propeller Systems, Inc. propeller models that are listed in Table 1 of this AD, and are installed on BAE Systems (Operations) Limited Jetstream Model 4101 airplanes. Table 1 follows:

TABLE 1.—PROPELLER MODELS BY HUB MODEL AND BLADE MODEL

Propeller hub model	With propeller blade model installed
B5JFR36C1101	114GC series.
C5JFR36C1102	L114GC series.
B5JFR36C1103	114HC series.
C5JFR36C1104	L114HC series.

Unsafe Condition

(d) This AD is prompted by a report of a significant crack in a propeller blade shank and two reports of cracks in the hubs of the same propeller model. We are issuing this AD to detect cracks in the propeller blade shank that could cause a failure of the propeller blade and loss of control of the airplane.

Compliance

(e) You must perform the actions within the compliance times specified in this AD unless the actions have already been done.

Fluorescent Penetrant Inspection (FPI) of Propeller Blades

(f) Fluorescent-penetrant inspect the propeller blade using the procedures specified in 3.A. through 3.I. of McCauley Alert Service Bulletin (ASB) ASB246B, Revision 2, dated July 11, 2003, and the compliance times specified in the following Table 2:

TABLE 2.—COMPLIANCE TIMES FOR FPI OF PROPELLER BLADES

If the propeller blade time-since-new (TSN) is—	Or if—	Then inspect—
(1) 10,000 hours TSN or more	The blade was overhauled at least twice	Within 50 hours time-in-service (TIS) after the effective date of this AD.
(2) 10,000 hours TSN or more and the blade has been overhauled within the last 200 hours TIS before the effective date of this AD.	The blade was overhauled at least twice, and the last overhaul was within the last 200 hours TIS before the effective date of this AD.	Within 250 hours TIS after the effective date of this AD.
(3) 6,000 hours TSN or more	The blade was overhauled at least once	Within 200 hours TIS after the effective date of this AD.
(4) Fewer than 6,000 TSN	The blade has not been overhauled	At the next overhaul.

Reporting Requirements

(g) The Office of Management and Budget (OMB) has approved the reporting requirements specified in 3.H. of McCauley ASB ASB246B, Revision 2, dated July 11, 2003, and assigned OMB control number 2120–0056.

Alternative Methods of Compliance (AMOCs)

(h) You must request AMOCs as specified in 14 CFR 39.19. All AMOCs must be

approved by the Manager, Chicago Aircraft Certification Office, FAA.

Material Incorporated by Reference

(i) You must use McCauley Propeller Systems, Inc., Alert Service Bulletin ASB246B, Revision 2, dated July 11, 2003, to perform the FPI. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may get a copy from McCauley Propeller Systems, 3535 McCauley Drive, Vandalia, OH 45377. You may review copies at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Related Information

(j) None.

Issued in Burlington, Massachusetts, on July 14, 2003.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–18236 Filed 7–15–03; 12:42 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No.FAA–2003–15124; Airspace Docket No. 03–ASO–5]

Amendment of Class E5 Airspace; Augusta, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E5 airspace at Augusta, GA. A Area Navigation (RNAV) Global Positioning system (GPS) Standard Instrument Approach Procedure (SIAP) has been developed to Augusta Regional Airport At Bush Field. Additionally, a modification has been made to the Augusta, GA, Class E5 airspace area to contain the Nondirectional Radio Beacon (NDB) Runway (RWY) 17 Standard Instrument Approach Procedure (SIAP) to Augusta Regional airport At Bush Field. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAP's

DATES: 0901 UTC, September 4, 2003.

FOR FURTHER INFORMATION CONTACT: Walter R. Cochran, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION:

History

On May 22, 2003, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by amending Class E5 airspace at Augusta, GA, (68 FR 27946). This action provides adequate Class E5 airspace for IFR operations at Augusta Regional Airport At Bush Field. Designations for Class E are published in FAA Order 7400.9K, dated August 30, 2002, and effective September 16, 2002, which is incorporated by reference in 14 CFR part 71.1. The Class E designations listed in this document will be published subsequently in the Order.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) amends Class E5 airspace at Augusta, GA.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (30 does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 401113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9K, Airspace Designations and Reporting Points, dated August 30, 2002, and effective September 16, 2002, is amended as follows:

Paragraph 6005 Class E Areas Extending Upward From 700 Feet or More Above the Surface of the Earth

* * * * *

ASO GA E5 Augusta, GA [REVISED]

Augusta Regional At Bush Field Airport, GA
(Lat. 33°22′12″ N, long. 81°57′52″ W)
Bushe NDB
(Lat. 33°17′13″ N, long. 81°56′49″ W)
Emory NDB
(Lat. 33°27′46″ N long. 81°59′49″ W)
Daniel Field
(Lat. 33°27′59″ N, long. 82°02′22″ W)
Burke County Airport
(Lat. 33°02′27″ N, long. 82°00′14″ W)
Burke County NDB
(Lat. 33°02′33″ long. 82°00′ 17″)
Millen Airport
(Lat. 32°53′38″ N, long. 81°57′54″ W)
Millen NDB
(Lat. 32°53′41″ N, long. 81°58′ 01″ W)

That airspace extending upward from 700 feet above the surface within an 8.2-mile radius of Augusta Regional At Bush Field Airport, and within 8 miles west and 4 miles east of the 172° bearing from the Bushe NDB extending from the 8.2-mile radius to 16 miles south of Bushe NDB, and within 8 miles west and 4 miles east of the 349° bearing from the Emory NDB extending from the 8.2-mile radius to 16 miles north of Emory NDB, and within a 6.3-mile radius of Daniel Field, and within a 6.2-mile radius of Burke County Airport and within 3.5 miles each side of the 243° bearing from the Burke County NDB extending from the 6.2-mile radius to 7 miles southwest of the NDB, and within a 6.4-mile radius of Millen Airport and within 4 miles east and 8 miles west of the 357° bearing from the Millen NDB extending from the 6.4-mile radius to 16 miles north of the airport.

* * * * *

Issued in College Park, Georgia on July 7, 2003.

Walter R. Cochran,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 03–18073 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release Nos. 34–48167; IA–2144; File No. S7–10–00]

RIN 3235–AD21

Electronic Filing by Investment Advisers; Amendments To Form ADV; Technical Amendments

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendments.

SUMMARY: The Commission is adopting technical revisions to Forms ADV, ADV–W and ADV–H and related rules under the Investment Advisers Act of 1940, which were published in the **Federal Register** on September 22, 2000 (65 FR 57437). The amendments are designed to aid advisers in the completion and filing of Forms ADV, ADV–W and ADV–H by clarifying certain instructions to the forms.

EFFECTIVE DATE: July 11, 2003.

FOR FURTHER INFORMATION CONTACT: Don L. Evans, Senior Counsel, at 202–942–0719, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'' or ''SEC'') is adopting technical amendments to rules 0–4, 203–1, 203–3, and 204–1 [17 CFR 275.04, 275.203–1, 275.203–3, and 275.204–1] and to Forms ADV, ADV–W and ADV–H [17 CFR 279.1, 279.2 and 279.3] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] (''Advisers Act'' or ''Act''). The Commission is also withdrawing rule 203A–6 [17 CFR 275.203A–6] under the Advisers Act.

I. Discussion

Investment advisers today utilize the Investment Adviser Registration Depository (''IARD''), a one-stop electronic filing system, to make registration and ''notice'' filings with the SEC and state regulators over the Internet. In conjunction with launching electronic filing for advisers in 2000, the Commission adopted several rules and rule amendments under the Advisers Act, related to the IARD.[1] Certain administrative issues have arisen regarding these revised rules and forms, and we are making technical amendments to address these issues.[2]

II. Rule and Form Amendments

A. Rule 0–4: General Requirements of Papers

We are amending rule 0–4 to extend filing deadlines when the IARD is closed to filings. Electronic filings otherwise required to be made in late December, when the IARD is shut down to process state renewals, must be filed on or before the following January 7. Other IARD filings required to be made on a day the IARD is closed to filings will be considered timely if filed on the following business day.[3]

B. Rule 204–1: Amendments to Application for Registration

We are deleting language in rule 204–1(b) that set out the transition period to IARD for SEC-registered advisers; this transition period ended April 30, 2001.[4] We are also amending the rule to clarify that advisers must file all amendments to Part 1A of Form ADV electronically with the IARD absent a continuing hardship exemption.

C. Form ADV: Uniform Application for Investment Adviser Registration; Part 1A, Item 7: Financial Industry Affiliations

We are revising the instructions to Form ADV, Part 1A, Items 7A and 7B. The change to Item 7A accommodates advisers that share personnel with an affiliated broker-dealer. NASD will accept a single Form U–4 filing, through IARD, to register an individual both as the advisory firm's investment adviser representative and as a registered representative of the advisory firm's affiliated broker-dealer, provided the adviser names the affiliated brokerage firm on its Form ADV.[5] Duplicative Form U–4 filings by an adviser and its affiliated broker-dealer create unnecessary burdens; as a convenience to filers, we are amending Part 1A, Item 7 to permit (but not require) an adviser to name, on Section 7.A. of Schedule D, any related persons that are broker-dealers.

Another change, to Item 7B, allows an adviser to cross-reference to the Form ADV of its SEC-registered affiliate in order to disclose the limited partnerships and limited liability companies that the affiliate advises.[6] An SEC-registered adviser may omit, from Section 7.B. of Schedule D, the details of LPs or LLCs managed by its related persons that are also SEC-registered advisers, so long as the adviser explains in the miscellaneous section of Schedule D that the detailed list is available on the related person's Form ADV.[7] In order to pass a ''completeness check'' on the IARD, however, all advisers that answer ''yes'' to Item 7B must list at least one LP or LLC in Section 7.B of Schedule D. The IARD will not allow an adviser to file a Form ADV that fails the completeness check.

III. Effective Date; Findings Under the Administrative Procedure Act

The technical amendments adopted today shall become effective July 11, 2003. An adviser is not required to file a separate amendment to its Form ADV solely to reflect these revisions. However, when it next files a Form ADV (including amending its Form ADV), Form ADV–W or Form ADV–H on or after the effective date, the adviser must use the rules and forms as revised.[8] These amendments make minor, technical changes to the manner in which advisers submit registration information to the Commission through

[1] Electronic Filing by Investment Advisers; Amendments to Form ADV, Investment Advisers Act Release No. 1897 (Sept. 12, 2000) [65 FR 57438 (Sept. 22, 2000)].

[2] In addition to the changes detailed below, we are (i) revising the Form ADV–H Item 1B language to refer to ''Item 12 of Part 1A'' of Form ADV rather than simply ''Item 12'', (ii) clarifying that Instruction 3 to Form ADV–W applies only to state-registered advisers, and (iii) amending rules 203–1, 203–3 and 204–1, the General Instructions to Form ADV, and Form ADV–W to reflect the correct name of the IARD operator due to a NASD corporate restructuring in the fall of 2002.

[3] Rule 0–4(a)(2) [17 CFR 275.0–4(a)(2)].

[4] We are also deleting rule 203A–6, which set out the transition period from SEC registration for certain advisers located in Ohio; this transition period ended March 30, 2000.

[5] The Form U–4 is the NASD uniform application for securities industry registration or transfer. Investment advisers submit Form U–4 through IARD to register investment adviser representatives with state securities authorities; broker-dealers submit it through the Central Registration Depository (CRD) for their registered representatives.

[6] A number of advisers currently follow this procedure in reliance on the SEC staff response to a ''frequently asked question'' on the SEC's IARD website.

[7] This explanation must state: (1) That the adviser has related SEC-registered investment advisers who manage investment related LPs or LLCs that are not listed in Section 7.B of its Schedule D, (2) that complete and accurate information about those investment related LPs or LLCs is available in Section 7.B of Schedule D of the Form ADVs of the related SEC-registered advisers; and (3) whether the adviser's clients are solicited to invest in any of those LPs or LLCs. If the adviser has a related person that is a general partner in an investment-related LP or manager of an investment-related LLC, and that related person is *not* registered with the SEC as an investment adviser, the adviser must continue to list all LPs and LLCs of that related person in Section 7.B of its own Schedule D.

[8] An adviser filing a Form ADV amendment through the IARD on or after the effective date will necessarily be submitting the revised version of the form. Because the revisions to Section 7.A of Schedule D add data fields, advisers may need to re-enter their responses to that Section. Advisers should review their responses to all of the affected sections of the Form carefully to ensure that they remain correct and complete.

the IARD, or eliminate outdated or confusing material contained in the rules and instructions for submitting such information. Therefore, the Commission finds that there is good cause to adopt them as final rules. Moreover, the amendments impose no new obligations on advisers; they are ''rules of agency * * * procedure'' that fall within exceptions to the general notice and comment requirements of the Administrative Procedure Act.[9]

IV. Consideration of Promotion of Efficiency, Competition, and Capital Formation

Section 202(c) of the Advisers Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[10]

As discussed above, the rule and form amendments will aid advisers in the completion of Forms ADV, ADV–W and ADV–H. The technical amendments may enhance efficiency further by clarifying the forms and their instructions, thereby improving an adviser's understanding of IARD and eliminating duplicative filings.

Because the rule and form amendments apply equally to all advisers, we do not anticipate that any competitive disadvantages would be created. We do not expect the amendments, as technical changes, to have an effect on capital formation or the capital markets.

V. Statutory Authority

We are adopting amendments to rule 0–4, General Requirements of Papers, under sections 204 and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–4 and 80b–11(a)].

We are adopting amendments to rule 203–1, Application for Investment Adviser Registration, under sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

We are adopting amendments to rule 203–3, Hardship Exemptions, under sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

We are withdrawing rule 203A–6 [17 CFR 275.203A–6], Transition Period for Ohio Investment Advisers, under section 203(h) [15 U.S.C. 80b–3(h)]; section 203A(c) [15 U.S.C. 80b–3a(c)]; and section 211(a) [15 U.S.C. 80b–11(a)] of the Investment Advisers Act of 1940.

We are adopting amendments to rule 204–1, Amendments to Application for Registration, under sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

We are adopting amendments to rule 279.1, Form ADV, under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

We are adopting amendments to rule 279.2, Form ADV–W, under sections 203(h), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(h), 80b–4, and 80–11(a)].

We are adopting amendments to rule 279.3, Form ADV–H, under sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

Need for Technical Amendment

As published, the final regulations contain errors which need to be clarified.

List of Subjects in 17 CFR Parts 275 and 279

Investment advisers, Reporting and recordkeeping requirements.

Text of Rule and Form Amendments

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–6(4), 80b–6a, 80b–11, unless otherwise noted.

* * * * *

■ 2. Paragraph (a) of § 275.04 is revised to read as follows:

§ 275.0–4 General requirements of papers and applications.

(a) *Filings.* (1) All papers required to be filed with the Commission shall, unless otherwise provided by the rules and regulations, be delivered through the mails or otherwise to the Securities and Exchange Commission, Washington, DC 20549. Except as otherwise provided by the rules and regulations, such papers shall be deemed to have been filed with the Commission on the date when they are actually received by it.

(2) All filings required to be made electronically with the Investment Adviser Registration Depository (''IARD'') shall, unless otherwise provided by the rules and regulations in this part, be deemed to have been filed with the Commission upon acceptance by the IARD. Filings required to be made through the IARD on a day that the IARD is closed shall be considered timely filed with the Commission if filed with the IARD no later than the following business day.

(3) Filings required to be made through the IARD during the period in December of each year that the IARD is not available for submission of filings shall be considered timely filed with the Commission if filed with the IARD no later than the following January 7.

Note to Paragraph (a)(3): Each year the IARD shuts down to filers for several days during the end of December to process renewals of state notice filings and registrations. During this period, advisers are not able to submit filings through the IARD. Check the Commission's Web site at *http://www.sec.gov/iard* for the dates of the annual IARD shutdown.

* * * * *

■ 3. Part 275 is amended by:

■ a. Revising the term ''NASD Regulation, Inc. (NASDR)'' to read ''NASD'' in: §§ 275.203–1(d) and 275.204–1(b)(3).

■ b. Revising the term ''NASD Regulation, Inc.'' to read ''NASD'' in § 275.203–3(b)(3).

■ c. Revising the term ''NASDR'' to read ''NASD'' in the following sections:

1. 275.203–1(d);

2. 275.203–3, Note to Paragraph (b); and

3. 275.204–1(d) each time it appears.

■ 4. Section 275.203A–6 is removed and reserved.

■ 5. Section 275.204–1 is amended by:

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[9] 5 U.S.C. 553(b)(3)(A) and (B). For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major rule status under the Small Business Regulatory Enforcement Fairness Act. *See* 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analyses, the term ''rule'' means any rule for which the agency publishes a general notice of proposed rulemaking); 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term ''rule'' does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

[10] 15 U.S.C. 80b–2(c).

■ a. Adding a note at the end of paragraph (a);
■ b. Revising paragraph (b); and
■ c. Revising the first sentence of paragraph (d).

The addition and revisions read as follows.

§ 275.204–1 Amendments to application for registration.

(a) * * *

Note to Paragraph (a): Information on how to file with the Investment Adviser Registration Depository (''IARD'') is available on our website at *www.sec.gov/iard.*

(b) *Electronic filing of amendments.* (1) You must file all amendments to Part 1A of your Form ADV electronically with the IARD, unless you have received a continuing hardship exemption under § 275.203–3.

(2) If you have received a continuing hardship exemption under § 275.203–3, you must, when you are required to amend your Form ADV, file a completed Part 1A of Form ADV on paper with the SEC by mailing it to the NASD.

* * * * *

(d) *Filing fees.* You must pay the NASD (the operator of the IARD) an initial filing fee when you first electronically file Part 1A of Form ADV.

* * *

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 6. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*

■ 7. Form ADV (referenced in § 279.1) is amended by:
■ a. In the form and instructions to the form, revising the terms ''NASDR'', ''NASD Regulation, Inc.'', ''National Association of Securities Dealers Regulation, Inc. (''NASDR'')'', and ''National Association of Securities Dealers, Inc. (''NASD'')'' to read ''NASD'';
■ b. In the instructions to the form, revising the heading ''Supplemental Instructions for Transition to Electronic Filing'' to read ''Supplemental Instructions for Electronic Filing'' and within those Supplemental Instructions revising the section entitled ''SEC Requirements''.
■ c. In Part 1A, revising the unnumbered paragraph in Item 7A. and Item 7B.; and
■ d. In Schedule D, revising Section 7.A.

The revisions read as follows:

Note: The text of Form ADV does not and this amendment will not appear in the Code of Federal Regulations.

Form ADV

* * * * *

Supplemental Instructions for Electronic Filing

SEC Requirements

SEC rules require advisers that are registered or applying for registration with the SEC to file electronically. All applications for registration filed after December 31, 2000 must be filed electronically through the IARD system. *See* SEC rule 203–1.

* * * * *

Part 1A

* * * * *

Item 7 Financial Industry Affiliations

* * * * *

A. * * *

If you checked Item 7A.(3), you must list on Section 7.A. of Schedule D all your *related persons* that are investment advisers. If you checked Item 7A.(1), you may elect to list on Section 7.A. of Schedule D all your *related persons* that are broker-dealers. If you choose to list a related broker-dealer, the IARD will accept a single Form U–4 to register an investment adviser representative who also is a broker-dealer agent (''registered rep'') of that related broker-dealer.

B. * * *

If ''yes,'' for each limited partnership or limited liability company, complete Section 7.B. of Schedule D. If, however, you are an SEC-registered adviser *and* you have *related persons* that are *SEC-registered* advisers who are the general partners of limited partnerships or the managers of limited liability companies, you do not have to complete Section 7.B. of Schedule D with respect to those related advisers' limited partnerships or limited liability companies.

To use this alternative procedure, you must state in the Miscellaneous Section of Schedule D:

(1) that you have related SEC-registered investment advisers that manage limited partnerships or limited liability companies that are not listed in Section 7.B. of your Schedule D;

(2) that complete and accurate information about those limited partnerships or limited liability companies is available in Section 7.B. of Schedule D of the Form ADVs of your related SEC-registered advisers; and

(3) whether your clients are solicited to invest in any of those limited partnerships or limited liability companies.

* * * * *

Schedule D

* * * * *

SECTION 7.A. Affiliated Investment Advisers and Broker-Dealers

You MUST complete the following information for each investment adviser with whom you are affiliated. You MAY complete the following information for each broker-dealer with whom you are affiliated. You must complete a separate Schedule D Page 3 for each listed affiliate.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Legal Name of Affiliate:

_____

Primary Business Name of Affiliate:

_____

Affiliate is (check only one box): ☐ Investment Adviser ☐ Broker-Dealer ☐ Dual (Investment Adviser and Broker-Dealer)

Affiliated Investment Adviser's SEC File Number (if any) 801–_____Affiliate's CRD Number (if any) _____

* * * * *

■ 8. Form ADV–W (referenced in § 279.2) is amended by:
■ a. In Instruction 3, revising the first undesignated paragraph;
■ b. In Instruction 3, revising the first sentence in the second undesignated paragraph;
■ c. In Instruction 3, revising the second sentence in the third undesignated paragraph;
■ d. In Instruction 5, revise the phrase ''NASD Regulation, Inc.'' to read ''NASD;'' and
■ e. In the Execution section, revise the fourth sentence.

The revisions read as follows.

Note: The text of Form ADV–W does not and this amendment will not appear in the Code of Federal Regulations.

Form ADV–W

* * * * *

Instructions for Form ADV–W

* * * * *

3. I am a state registered adviser filing for partial withdrawal. How do I complete Item 2?

If you are a state registered adviser ceasing advisory business in any of the jurisdictions from which you are withdrawing, check ''yes.'' * * *

* * * You are permitted to enter a cease date of December 31 to avoid being charged state renewal fees in jurisdictions from which you are withdrawing (during the last part of December each year the IARD suspends filing operations for several days to process renewals of state registrations and state notice filings; and you are

unable to submit any filings during that time). * * *

Execution

* * * I understand that if any information contained in items 1D or 1E of this Form ADV–W is different from the information contained on Form ADV, the information on this Form ADV–W will replace the corresponding entry on the adviser's Form ADV composite available through IARD.
* * *

* * * * *

■ 9. Form ADV–H (referenced in § 279.3) is amended by revising the phrase ''Item 12 of Form ADV'' in the third and fourth unnumbered paragraphs in Item 1B. to read ''Item 12 of Part 1A of Form ADV''.

Note: Form ADV–H does not and this amendment will not appear in the Code of Federal Regulations.

Dated: July 11, 2003.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18122 Filed 7–16–03; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 524

New Animal Drugs; Change of Sponsor; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of June 4, 2003 (68 FR 33381). The document amended the animal drug regulations to reflect a change of sponsor for an approved new animal drug application (NADA) from Combe, Inc., to Farnam Companies, Inc. The document was published with some errors. This document corrects those errors.

FOR FURTHER INFORMATION CONTACT: Joyce A. Strong, Office of Policy (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville MD 20857, 301–827–7010.

SUPPLEMENTARY INFORMATION: In FR Doc. 03–14107, appearing on page 33381 in the **Federal Register** of June 4, 2003, the following corrections are made:

■ 1. On page 33381, in the first column, in the ''**SUMMARY**'', the word ''Farnham'' is corrected to read ''Farnam''.

■ 2. On page 33381, in the second column, in the sixth line from the bottom, ''**§ 524.1580b [Amended]**'' is corrected to read ''**§ 524.1376 [Amended]**''.

Dated: July 7, 2003.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 03–18086 Filed 7–16–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

Implantation or Injectable Dosage Form New Animal Drugs; Trenbolone and Estradiol

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental abbreviated new animal drug application (ANADA) filed by Ivy Laboratories, Division of Ivy Animal Health, Inc. The supplemental ANADA provides for the addition of tylosin tartrate to an approved subcutaneous implant containing trenbolone and estradiol used for increased rate of weight gain and improved feed efficiency in feedlot heifers.

DATES: This rule is effective July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Eric S. Dubbin, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855; 301–827–0232; *edubbin@cvm.fda.gov*.

SUPPLEMENTARY INFORMATION: Ivy Laboratories, Division of Ivy Animal Health, Inc., 8857 Bond St., Overland Park, KS 66214, filed a supplement to ANADA 200–346 for COMPONENT TE-H (trenbolone acetate and estradiol), a subcutaneous implant used for increased rate of weight gain and improved feed efficiency in heifers fed in confinement for slaughter. The supplemental ANADA provides for the addition of a pellet containing 29 milligrams tylosin tartrate to the approved implant. The supplemental application is approved as of April 18, 2003, and the regulations are amended in 21 CFR 522.2477 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360b(c)(2)(F)(iii)), this approval qualifies for 3 years of marketing exclusivity beginning April 18, 2003.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. Section 522.2477 is amended in paragraph (b)(1) by adding ''(d)(2)(i)(B),'' after ''(d)(2)(i)(A),''; in paragraph (b)(2) by removing ''(d)(2)'' and by adding in its place ''(d)(2)(i)(A), (d)(2)(i)(C), (d)(2)(i)(D), (d)(2)(ii), (d)(2)(iii)''; in paragraph (d)(2)(i)(A) by removing ''paragraphs (d)(2)(ii)(A) and (d)(2)(ii)(B)'' and by adding in its place ''paragraph (d)(2)(ii)(A)''; by redesignating paragraphs (d)(2)(i)(B) and (d)(2)(i)(C) as paragraphs (d)(2)(i)(C) and (d)(2)(i)(D); and by adding new paragraph (d)(2)(i)(B) to read as follows:

§ 522.2477 Trenbolone acetate and estradiol.

* * * * *

(d) * * *

(2) * * *

(i) * * *

(B) 140 mg trenbolone acetate and 14 mg estradiol (one implant consisting of 8 pellets, each of 7 pellets containing 20 mg trenbolone acetate and 2 mg estradiol, and 1 pellet containing 29 mg tylosin tartrate) per implant dose for use as in paragraphs (d)(2)(ii)(A) of this section.

* * * * *

Dated: July 8, 2003.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 03–18088 Filed 7–16–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9078]

RIN 1545–AY76

Qualified Subchapter S Trust Election for Testamentary Trusts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to a qualified subchapter S trust election for testamentary trusts under section 1361 of the Internal Revenue Code. The Small Business Job Protection Act of 1996 and the Taxpayer Relief Act of 1997 made changes to the applicable law. The final regulations affect S corporations and their shareholders.

DATES: *Effective Date:* These regulations are effective July 17, 2003.

Applicability Date: For dates of applicability of these regulations, see § 1.1361–1(k)(2)(i) and (ii).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations, Deane M. Burke, (202) 622–3070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends section 1361 of the Income Tax Regulations (26 CFR part 1) regarding a qualified subchapter S trust (QSST) election for testamentary trusts and the definition of testamentary trusts.

On August 24, 2001, a notice of proposed rulemaking (REG–106431–01, 2001–2 C.B. 272) relating to QSST elections for testamentary trusts and the period for which former qualified subpart E trusts and testamentary trusts may be permitted shareholders under section 1361 was published in the **Federal Register** (66 FR 44565). No public hearing was requested. Comments responding to the proposed regulations were received. After consideration of the comments, the proposed regulations are adopted as revised by this Treasury decision.

Section 1361(a) defines an S corporation as a small business corporation for which an election under section 1362(a) is in effect for the year. Section 1361(b) provides, in part, that a small business corporation is a domestic corporation that is not an ineligible corporation and that does not have as a shareholder a person (other than an estate, a trust described in section 1361(c)(2), or an organization described in section 1361(c)(6)) who is not an individual. Under section 1361(c)(2), qualified subpart E trusts and testamentary trusts are permitted S corporation shareholders. A qualified subpart E trust is a trust, all of which is treated (under subpart E of part I of subchapter J, chapter 1) as owned by an individual who is a citizen or resident of the United States. A qualified subpart E trust that continues in existence after the death of the deemed owner (former qualified subpart E trust) is a permitted shareholder, but only for the 2-year period beginning on the day of the deemed owner's death. A testamentary trust is a trust to which S corporation stock is transferred pursuant to the terms of a will, but only for the 2-year period beginning on the day the stock is transferred to the trust.

Summary of Comments and Explanation of Provisions

These final regulations are substantially the same as the proposed regulations, but reflect certain revisions based on the comments that were received. The revisions are discussed below.

The proposed regulations provide that a former qualified subpart E trust is a permitted shareholder of an S corporation for the 2-year period beginning on the day of the deemed owner's death. In addition, the proposed regulations provide that a testamentary trust is also a permitted shareholder of an S corporation for the 2-year period beginning on the day the stock is transferred to the testamentary trust. If a former qualified subpart E trust or a testamentary trust continues to own stock after the expiration of the 2-year period during which it is a permitted shareholder, the corporation's S election will terminate unless the trust otherwise qualifies as a permitted shareholder. The trust might otherwise qualify as a permitted shareholder if, for example, the trust is a QSST that has an election under section 1361(d)(2) in effect at the end of the 2-year period (an electing QSST).

One commentator suggested that certain sections of the proposed regulations should be clarified because those sections indicate that if a former qualified subpart E trust or a testamentary trust continues to own stock of an S corporation after the 2-year period and is not otherwise a qualified subpart E trust or an electing QSST, the trust is not a permitted shareholder. The commentator noted that a former qualified subpart E trust or a testamentary trust that continues to own stock after the 2-year period could also be a permitted shareholder if the trust is an electing small business trust (ESBT) at the end of the 2-year period. The sections of the proposed regulations for which the commentator suggested clarification, however, address rules regarding QSSTs. Section 1.1361–1(m) of the Income Tax Regulations addresses rules regarding ESBTs. The final regulations clarify that if a former qualified subpart E trust or a testamentary trust continues to own stock of an S corporation after the 2-year period and is not otherwise a qualified subpart E trust, an electing QSST, or an ESBT, the trust is not a permitted shareholder. Additionally, the final regulations clarify that a QSST or an ESBT election may be made for a former qualified subpart E trust or a testamentary trust that qualifies as a QSST or an ESBT.

Another commentator suggested that after August 5, 1997, the effective date of section 645, a testamentary trust should also include a trust that receives S corporation stock from a qualified revocable trust (QRT) for which an election under section 645 has been made (an electing trust). Under section 645, an electing trust is treated and taxed as part of the decedent's estate (and not as a separate trust) for purposes of subtitle A of the Code for all taxable years of the estate during the section 645 election period. The section 645 election period begins on the date of the decedent's death and generally terminates on the day before the applicable date described in section 645(b)(2). Section 1.645–1(h)(1) provides that on the close of the last day of the election period the share comprising the electing trust is deemed to be distributed to a new trust.

Thus, according to the commentator, the final regulations should clarify that testamentary trusts include trusts to which S corporation stock is transferred pursuant to the terms of the electing trust during the section 645 election period as well as new trusts to which S corporation stock is deemed to be distributed at the end of the section 645 election period. The commentator noted that the purpose of section 645 is to create parity between electing trusts and wills. In furtherance of this purpose, the commentator reasoned that if an electing trust transfers or is deemed to distribute S corporation stock to a new trust, the new trust should be a permitted shareholder for the 2-year period beginning on the day the stock is transferred or deemed distributed to the new trust. The final regulations adopt the commentator's suggestion to clarify that a testamentary trust also includes a trust that receives S corporation stock from an electing trust.

The IRS is considering issuing guidance on whether a trust that has a QSST or an ESBT election in effect may make an election under section 645.

Effective Date

Except where otherwise specifically provided, these final regulations are applicable on and after July 17, 2003. In addition, the IRS will not challenge the treatment of certain testamentary trusts that receive S corporation stock from an electing trust under section 645 as permitted shareholders of the S corporation for periods after August 5, 1997, and before the earlier of July 17, 2003, or the effective date of any QSST or ESBT election for the trust.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 533(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Deane M. Burke, Office of the Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1361–1 is amended as follows:

■ 1. Paragraphs (b)(1)(ii), (f), (h)(1)(ii), (h)(1)(iv), (h)(3)(i)(B), (h)(3)(i)(D), (h)(3)(ii)(A), (h)(3)(ii)(B), (j)(6)(iii)(C), (j)(7)(ii), the fourth and last sentences of paragraph (k)(1) *Example 2*(ii), (k)(1) *Examples 3* and *4*(iii), and (k)(2)(i) are revised.

■ 2. The undesignated paragraph following paragraph (h)(3)(i)(B) is removed.

■ 3. Paragraph (j)(6)(iii)(D) is redesignated as paragraph (j)(6)(iii)(E).

■ 4. New paragraph (j)(6)(iii)(D) is added.

■ 5. Paragraph (k)(2)(ii) is redesignated as paragraph (k)(2)(iii).

■ 6. New paragraph (k)(2)(ii) is added.

The revisions and additions read as follows:

§ 1.1361–1 S corporation defined.

* * * * *

(b)* * * (1)* * *

(ii) As a shareholder, a person (other than an estate, a trust described in section 1361(c)(2), or, for taxable years beginning after December 31, 1997, an organization described in section 1361(c)(6)) who is not an individual;

* * * * *

(f) *Shareholder must be an individual or estate.* Except as otherwise provided in paragraph (e)(1) of this section (relating to nominees), paragraph (h) of this section (relating to certain trusts), and, for taxable years beginning after December 31, 1997, section 1361(c)(6) (relating to certain exempt organizations), a corporation in which any shareholder is a corporation, partnership, or trust does not qualify as a small business corporation.

* * * * *

(h)* * * (1)* * *

(ii) *Subpart E trust ceasing to be a qualified subpart E trust after the death of deemed owner.* A trust that was a qualified subpart E trust immediately before the death of the deemed owner and that continues in existence after the death of the deemed owner, but only for the 2-year period beginning on the day of the deemed owner's death. A trust is considered to continue in existence if the trust continues to hold the stock pursuant to the terms of the will or the trust agreement, or if the trust continues to hold the stock during a period reasonably necessary to wind up the affairs of the trust. See § 1.641(b)-3 for rules concerning the termination of trusts for federal income tax purposes.

* * * * *

(iv) *Testamentary trusts.* A trust (other than a qualified subpart E trust, an electing QSST, or an electing small business trust) to which S corporation stock is—

(A) Transferred pursuant to the terms of a will, but only for the 2-year period beginning on the day the stock is transferred to the trust except as otherwise provided in paragraph (h)(3)(i)(D) of this section; or

(B) Transferred pursuant to the terms of an electing trust as defined in § 1.645–1(b)(2) during the election period as defined in § 1.645–1(b)(6), or deemed to be distributed at the close of the last day of the election period pursuant to § 1.645–1(h)(1), but in each case only for the 2-year period beginning on the day the stock is transferred or deemed distributed to the trust except as otherwise provided in paragraph (h)(3)(i)(D) of this section.

* * * * *

(3)* * * (i)* * *

(B) If stock is held by a trust defined in paragraph (h)(1)(ii) of this section, the estate of the deemed owner is generally treated as the shareholder as of the day of the deemed owner's death. However, if stock is held by such a trust in a community property state, the decedent's estate is the shareholder only of the portion of the trust included in the decedent's gross estate (and the surviving spouse continues to be the shareholder of the portion of the trust owned by that spouse under the applicable state's community property law). The estate ordinarily will cease to be treated as the shareholder upon the earlier of the transfer of the stock by the trust or the expiration of the 2-year period beginning on the day of the deemed owner's death. If the trust qualifies and becomes an electing QSST, the beneficiary and not the estate is treated as the shareholder as of the

effective date of the QSST election, and the rules provided in paragraph (j)(7) of this section apply. If the trust qualifies and becomes an ESBT, the shareholders are determined under paragraphs (h)(3)(i)(F) and (h)(3)(ii) of this section as of the effective date of the ESBT election, and the rules provided in paragraph (m) of this section apply.

* * * * *

(D) If stock is transferred or deemed distributed to a testamentary trust described in paragraph (h)(1)(iv) of this section (other than a qualified subpart E trust, an electing QSST, or an ESBT), the estate of the testator is treated as the shareholder until the earlier of the transfer of that stock by the trust or the expiration of the 2-year period beginning on the day that the stock is transferred or deemed distributed to the trust. If the trust qualifies and becomes an electing QSST, the beneficiary and not the estate is treated as the shareholder as of the effective date of the QSST election, and the rules provided in paragraph (j)(7) of this section apply. If the trust qualifies and becomes an ESBT, the shareholders are determined under paragraphs (h)(3)(i)(F) and (h)(3)(ii) of this section as of the effective date of the ESBT election, and the rules provided in paragraph (m) of this section apply.

* * * * *

(ii)* * *

(A) If stock is held by a trust as defined in paragraph (h)(1)(ii) of this section (other than an electing QSST or an ESBT), the trust is treated as the shareholder. If the trust continues to own the stock after the expiration of the 2-year period, the corporation's S election will terminate unless the trust is otherwise a permitted shareholder.

(B) If stock is transferred or deemed distributed to a testamentary trust described in paragraph (h)(1)(iv) of this section (other than a qualified subpart E trust, an electing QSST, or an ESBT), the trust is treated as the shareholder. If the trust continues to own the stock after the expiration of the 2-year period, the corporation's S election will terminate unless the trust otherwise qualifies as a permitted shareholder.

* * * * *

(j)* * *

(6)* * *

(iii)* * *

(C) If a trust ceases to be a qualified subpart E trust, satisfies the requirements of a QSST, and intends to become a QSST, the QSST election must be filed within the 16-day-and-2-month period beginning on the date on which the trust ceases to be a qualified subpart E trust. If the estate of the deemed owner of the trust is treated as the shareholder under paragraph (h)(3)(i) of this section, the QSST election may be filed at any time, but no later than the end of the 16-day-and-2-month period beginning on the date on which the estate of the deemed owner ceases to be treated as a shareholder.

(D) If a testamentary trust is a permitted shareholder under paragraph (h)(1)(iv) of this section, satisfies the requirements of a QSST, and intends to become a QSST, the QSST election may be filed at any time, but no later than the end of the 16-day-and-2-month period beginning on the day after the end of the 2-year period.

* * * * *

(7) * * *

(ii) If, upon the death of an income beneficiary, the trust continues in existence, continues to hold S corporation stock but no longer satisfies the QSST requirements, is not a qualified subpart E trust, and does not qualify as an ESBT, then, solely for purposes of section 1361(b)(1), as of the date of the income beneficiary's death, the estate of that income beneficiary is treated as the shareholder of the S corporation with respect to which the income beneficiary made the QSST election. The estate ordinarily will cease to be treated as the shareholder for purposes of section 1361(b)(1) upon the earlier of the transfer of that stock by the trust or the expiration of the 2-year period beginning on the day of the income beneficiary's death. During the period that the estate is treated as the shareholder for purposes of section 1361(b)(1), the trust is treated as the shareholder for purposes of sections 1366, 1367, and 1368. If, after the 2-year period, the trust continues to hold S corporation stock and does not otherwise qualify as a permitted shareholder, the corporation's S election terminates. If the termination is inadvertent, the corporation may request relief under section 1362(f).

* * * * *

(k)(1)* * *

Example 2. * * *

(ii) * * * A's estate will cease to be treated as the shareholder for purposes of section 1361(b)(1) upon the earlier of the transfer of the Corporation M stock by the trust (other than to A's estate), the expiration of the 2-year period beginning on the day of A's death, or the effective date of a QSST or ESBT election if the trust qualifies as a QSST or ESBT. * * * If no QSST or ESBT election is made effective upon the expiration of the 2-year period, the corporation ceases to be an S corporation, but the trust continues as the shareholder of a C corporation.

* * * * *

Example 3. (i) *2-year rule under section 1361(c)(2)(A)(ii) and (iii).* F owns stock of Corporation P, an S corporation. In addition, F is the deemed owner of a qualified subpart E trust that holds stock in Corporation O, an S corporation. F dies on July 1, 2003. The trust continues in existence after F's death but is no longer a qualified subpart E trust. On August 1, 2003, F's shares of stock in Corporation P are transferred to the trust pursuant to the terms of F's will. Because the stock of Corporation P was not held by the trust when F died, section 1361(c)(2)(A)(ii) does not apply with respect to that stock. Under section 1361(c)(2)(A)(iii), the last day on which the trust could be treated as a permitted shareholder of Corporation P is July 31, 2005 (that is, the last day of the 2-year period that begins on the date of the transfer from the estate to the trust). With respect to the shares of stock in Corporation O held by the trust at the time of F's death, section 1361(c)(2)(A)(ii) applies and the last day on which the trust could be treated as a permitted shareholder of Corporation O is June 30, 2005 (that is, the last day of the 2-year period that begins on the date of F's death).

(ii) *Section 645 electing trust and successor trust.* Assume the same facts as in paragraph (i) of this *Example 3,* except that F's trust is a qualified revocable trust for which a valid section 645 election is made on October 1, 2003 (electing trust). Because under section 645 the electing trust is treated and taxed for purposes of subtitle A of the Code as part of F's estate, the trust may continue to hold the O stock pursuant to § 1361(b)(1)(B), without causing the termination of Corporation O's S election, for the duration of the section 645 election period. However, on January 1, 2004, during the election period, the shares of stock in Corporation O are transferred pursuant to the terms of the electing trust to a successor trust. Because the successor trust satisfies the definition of a testamentary trust under paragraph (h)(1)(iv) of this section, the successor trust is a permitted shareholder until the earlier of the expiration of the 2-year period beginning on January 1, 2004, or the effective date of a QSST or ESBT election for the successor trust.

Example 4. * * *

(iii) *QSST when a person other than the current income beneficiary may receive trust corpus.* Assume the same facts as in paragraph (i) of this *Example 4,* except that the events occur in 2003 and H dies on November 1, 2003, and the trust does not qualify as an ESBT. Under the terms of the trust, after H's death, L is the income beneficiary of the trust and the trustee is authorized to distribute trust corpus to L as well as to J. The trust ceases to be a QSST as of November 1, 2003, because corpus distributions may be made to someone other than L, the current (successive) income beneficiary. Under section 1361(c)(2)(B)(ii), H's estate (and not the trust) is considered to be the shareholder for purposes of section 1361(b)(1) for the 2-year period beginning on November 1, 2003. However, because the trust continues in existence after H's death and will receive any distributions from the corporation, the trust (and not H's estate) is treated as the shareholder for purposes of

sections 1366, 1367, and 1368, during that 2-year period. After the 2-year period, the S election terminates and the trust continues as a shareholder of a C corporation. If the termination is inadvertent, Corporation Q may request relief under section 1362(f). However, the S election would not terminate if the trustee distributed all Corporation Q shares to L, J, or both on or before October 31, 2005, (the last day of the 2-year period) assuming that neither L nor J becomes the 76th shareholder of Corporation Q as a result of the distribution.

* * * * *

(2) * * * (i) *In general.* Paragraph (a) of this section, and paragraphs (c) through (k) of this section (as contained in the 26 CFR edition revised April 1, 2003) apply to taxable years of a corporation beginning after July 21, 1995. For taxable years beginning on or before July 21, 1995, to which paragraph (a) of this section and paragraphs (c) through (k) of this section (as contained in the 26 CFR edition revised April 1, 2003) do not apply, see § 18.1361–1 of this chapter (as contained in the 26 CFR edition revised April 1, 1995). However, paragraphs (h)(1)(vi), (h)(3)(i)(F), (h)(3)(ii), and (j)(12) of this section (as contained in the 26 CFR edition revised April 1, 2003) are applicable for taxable years beginning on and after May 14, 2002. Otherwise, paragraphs (b)(1)(ii), (f), (h)(1)(ii), (h)(1)(iv), (h)(3)(i)(B), (h)(3)(i)(D), (h)(3)(ii)(A), (h)(3)(ii)(B), (j)(6)(iii)(C), (j)(6)(iii)(D), (j)(7)(ii), and (k)(1) *Example 2*(ii) fourth and last sentences, *Example 3,* and *Example 4*(iii) of this section apply on and after July 17, 2003.

(ii) *Transition rules.* Taxpayers may apply paragraph (h)(1)(iv)(B) of this section on and after December 24, 2002, and before July 17, 2003, to treat a trust as a testamentary trust, but not during any period for which a QSST or ESBT election was in effect for the trust. In addition, the Internal Revenue Service will not challenge the treatment of a trust described in paragraph (h)(1)(iv)(B) of this section as a permitted shareholder of an S corporation for periods after August 5, 1997, and before the earlier of July 17, 2003, or the effective date of any QSST or ESBT election for that trust.

* * * * *

Robert E. Wenzel,

Deputy Commissioner for Services and Enforcement.

Approved: July 9, 2003.

Pamela F. Olson,

Assistant Secretary of the Treasury.

[FR Doc. 03–18040 Filed 7–16–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9079]

RIN 1545–BA47

10 or More Employer Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations that provide rules regarding the requirements for a welfare benefit fund that is part of a 10 or more employer plan. The regulations affect certain employers that provide welfare benefits to employees through a plan to which more than one employer contributes.

DATES: *Effective Date:* These regulations are effective July 17, 2003.

Applicability Date: For dates of applicability, *see* § 1.419A(f)(6)–1(g).

FOR FURTHER INFORMATION CONTACT: Betty J. Clary, (202) 622–6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1795. Responses to these collections of information are required to obtain a benefit (to be treated as a 10 or more employer plan excepted from the deduction limits for employer contributions to a welfare benefit fund).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

The estimated annual burden per respondent and/or recordkeeper varies, depending on individual circumstances, with an estimated average of 25 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to these collections of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the Income Tax Regulations under section 419A of the Internal Revenue Code (Code). Sections 419 and 419A, which were added to the Code by section 511 of the Deficit Reduction Act of 1984 (Pub. L. 98–369, 98 Stat. 494) set forth special rules limiting the deduction of employer contributions to a welfare benefit fund. Pursuant to section 419A(f)(6), the rules of sections 419 and 419A do not apply in the case of a welfare benefit fund that is part of a plan to which more than one employer contributes and to which no employer normally contributes more than 10 percent of the contributions of all employers under the plan, but only if the plan does not maintain experience-rating arrangements with respect to individual employers.

Section 419A(i) of the Code provides that the Secretary shall prescribe regulations as may be appropriate to carry out the purposes of sections 419 and 419A. Section 419A(i) further provides that the regulations may provide that the plan administrator of any welfare benefit fund to which more than one employer contributes shall submit such information to the employers contributing to the fund as may be necessary to enable the employers to comply with the provisions of section 419A.

The legislative history of sections 419 and 419A of the Code explains that the principal purpose of the deduction limits for contributions to welfare benefit funds ''is to prevent employers from taking premature deductions, for expenses which have not yet been incurred, by interposing an intermediary organization which holds assets which are used to provide benefits to the employees of the employer.'' H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1155 (1984), 1984–3 C.B. (Vol. 2) 1, 409.

The legislative history of section 419A(f)(6) of the Code explains that the reason the deduction limits of sections 419 and 419A do not generally apply to a fund that is part of a 10 or more employer plan is that ''the relationship of a participating employer to [such a] plan often is similar to the relationship of an insured to an insurer.'' H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1159

(1984), 1984–3 C.B. (Vol. 2) 1, 413. Thus, the premise underlying the exception is that no special limitation on deductions is necessary in situations where a payment by an employer in excess of the minimum necessary to currently provide for the benefits under the plan is effectively lost to that employer, because the economics of the plan will discourage excessive contributions.

The 10 or more employer plan exception to the deduction limitation does not apply, however, where the plan maintains experience-rating arrangements with respect to individual employers. The reason for excluding these plans from the exception is that an experience-rating arrangement with respect to an individual employer changes the economics of the plan and allows an employer to contribute an amount in excess of the minimum amount necessary to provide for the current benefits with the confidence that the excess will inure to the benefit of that employer as the excess is used to provide benefits to its employees. The legislative history notes that making the exception to the deduction limits unavailable to plans that determine contributions on the basis of experience rating is consistent with the general rules relating to the definition of fund because ''the employer's interest with respect to such a plan is more similar to the relationship of an employer to a fund than an insured to an insurer.'' H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1159 (1984), 1984–3 C.B. (Vol. 2) 1, 413.

In Notice 95–34 (1995–1 C.B. 309), the IRS identified certain types of arrangements that do not satisfy the requirements of section 419A(f)(6). Those arrangements typically require large employer contributions relative to the cost of the coverage for the benefits to be provided under the plan. The plans identified in the Notice often maintain separate accounting of the assets attributable to the contributions made by each participating employer.[1] In some cases an employer's contributions are related to the claims experience of its employees, while in other cases benefits are reduced if assets derived from an employer's contributions are insufficient to fund the benefits to that employer's employees. Thus, a particular employer's contributions or its employees' benefits may be determined in a way that insulates the employer to a significant extent from the experience of other participating employers.

The arrangements described in Notice 95–34 and similar arrangements do not satisfy the requirements of section 419A(f)(6) of the Code and do not provide the tax deductions claimed by their promoters for any of several reasons. For example, such an arrangement may be providing deferred compensation; the arrangement may be separate plans maintained for each employer; or the plan may be maintaining, in form or in operation, experience-rating arrangements with respect to individual employers (*e.g.*, where the employers have reason to expect that, at least for the most part, their contributions will benefit only their own employees). The Notice also states that even if an arrangement satisfies the requirements of section 419A(f)(6), so that the deduction limits of sections 419 and 419A do not apply to the arrangement, the employer contributions may represent expenses that are not deductible under other sections of the Code.

Transactions that are the same as or substantially similar to the transactions described in Notice 95–34 are listed transactions for purposes of the tax shelter disclosure, registration, and list maintenance requirements. *See* Notice 2000–15 (2000–1 C.B. 826) (supplemented and superseded by Notice 2001–51 (2001–2 C.B. 190)), § 1.6011–4(b)(2) of the Income Tax Regulations, and §§ 301.6111–2(b)(2) and 301.6112–1(b)(2) of the Procedure and Administration Regulations.

On July 11, 2002, a notice of proposed rulemaking (REG–165868–01) relating to whether a welfare benefit fund is part of a 10 or more employer plan (as defined in section 419A(f)(6) of the Internal Revenue Code) was published in the **Federal Register** (67 FR 45933). Written and electronic comments responding to the notice of proposed rulemaking were received. A public hearing was held on November 14, 2002. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The revisions are discussed below.

Explanation of Provisions

Overview of Rules

These regulations provide guidance under section 419A(f)(6) of the Code regarding the requirements that a welfare benefit fund must satisfy in order for an employer's contribution to the fund to be excepted from the rules of sections 419 and 419A.

Section 419A(f)(6) of the Code provides that sections 419 and 419A do not apply in the case of a welfare benefit fund that is part of a 10 or more employer plan that does not maintain experience-rating arrangements with respect to individual employers. A *10 or more employer plan* is a plan to which more than one employer contributes and to which no employer normally contributes more than 10 percent of the total contributions contributed under the plan by all employers. The regulations provide that an employer is determined by aggregating all of the entities required to be aggregated under the rules under section 414(b), (c), or (m). This is particularly relevant for purposes of determining how many employers contribute, whether an employer normally contributes more than 10 percent of the total contributions under the plan, and whether the plan maintains experience-rating arrangements with respect to individual employers.

In addition, the regulations make clear that in order to be eligible for the exception from the deduction limits of sections 419 and 419A, a plan must satisfy the requirements of section 419A(f)(6) and these regulations both in form and operation. The determination of whether a plan is described in section 419A(f)(6) is based on the totality of the arrangement and all related facts and circumstances, including any related insurance contracts. Thus, all agreements and understandings (including promotional materials and policy illustrations) will be taken into account in determining whether the requirements of section 419A(f)(6) are satisfied in form and in operation. For example, if promotional materials indicate that an employer or its employees can be expected to receive a future benefit based on the employer's accumulated contributions, the plan will be treated as maintaining experience-rating arrangements with respect to individual employers, even if the formal plan does not specifically provide for experience rating.

The regulations provide generally that a plan maintains an experience-rating arrangement with respect to an employer—making the plan ineligible for the section 419A(f)(6) exception—if any employer's cost of coverage for any period is based, in whole or in part, either on the benefits experience or on the overall experience of that employer or one or more employees of that employer. For purposes of the regulations, an employer's *cost of coverage* is the relationship between that employer's contributions (including those of its employees) under the plan and the benefits or other amounts payable under the plan with respect to

[1] *See Booth* v. *Commissioner,* 108 T.C. 524 (1997), for an arrangement using a separate accounting system that does not qualify under the 10 or more employer plan exception.

that employer. The term *benefits or other amounts payable* includes all amounts payable or distributable (or that will be otherwise provided), regardless of the form of the payment or distribution. *Benefits experience* refers, generally, to the benefits and other amounts incurred, paid, or distributed (or otherwise provided) in the past. The *overall experience* of an employer is the balance that would have accumulated in a welfare benefit fund if that employer were the only employer providing benefits under the plan. The *overall experience* of an employee is the balance that would have accumulated in a welfare benefit fund if that employee were the only employee being provided benefits under the plan. *Overall experience* is defined similarly for a group of employers or a group of employees.

Definition of Experience Rating

A number of commentators suggested that the regulatory definition of experience-rating arrangement is inconsistent with industry usage and the discussions of experience rating set forth in *United States* v. *American Bar Endowment,* 477 U.S. 105 (1986) and *Sears Roebuck and Co.* v. *Commissioner,* 972 F.2d 858 (7th Cir. 1992). These commentators have urged that an experience-rating arrangement be narrowly defined to include only those situations in which the employer is automatically entitled to a refund of a portion of a premium payment if claims experience is better than expected.

The IRS and Treasury have reviewed these comments and have concluded that the proposed regulatory definition of experience-rating arrangement should be retained in the final regulations. Where a Code section provides an exception from the normal tax requirements, the exception must be narrowly applied and its exclusions interpreted broadly. *Corn Products Refining Co.* v. *Commissioner,* 350 U.S. 46, 52 (1955). See also, *Arkansas Best Corporation* v. *Commissioner,* 485 U.S. 212, 219–220 (1987). Thus, the exclusion for experience-rating arrangements under the 10 or more employer plan exception should be interpreted broadly.

While both the *American Bar Endowment* case and the *Sears* case discuss a specific type of experience rating, there are other ways an insurance contract or other arrangement might take experience into account. For example, under one type of experience-rating arrangement, if the premiums paid exceed the actual cost of providing insurance to the group, the excess (the source of the dividend described in *American Bar Endowment*) is not refunded to the premium payer, but is instead used to reduce the cost of providing benefits for subsequent periods. This reduction in the cost of providing benefits for subsequent periods can be accomplished directly by adjusting premiums or indirectly by providing additional benefits under the arrangement at no cost to the premium payer, or through a combination of premium reductions and additional benefits.

In view of the variety of ways that an arrangement might take experience into account, the regulations provide that a plan maintains an experience-rating arrangement with respect to an individual employer if the current (or future) cost of coverage of the employer is (or will be) based on either the past benefits or other amounts paid with respect to one or more of that employer's employees (or any proxy therefor) or on the balance accumulated in the fund as a result of the employer's or its employees' past contributions (or any proxy therefor). Accordingly, the process for determining whether a plan maintains an experience-rating arrangement is to inquire whether the past experience of an individual employer or its employees is used, in whole or in part, to determine the employer's cost of coverage. This determination is not intended to be purely a computational one (although actual numbers often can be used to demonstrate the existence of an experience-rating arrangement).

Some commentators suggested that the regulations equate benefits provided to the employees of an employer with a payment to the employer and that such an equation improperly ignores the existence of the employer. This comment is based on a misreading of the regulations. The regulations reflect the fact that the provision of a benefit to an employee at no cost to the employer is, in effect, a credit to the employer that offsets the employer's otherwise applicable cost of providing that benefit. Accordingly, if the amount of such a benefit is based on the experience of the employer or its employees, the plan includes an experience-rating arrangement with respect to individual employers and is ineligible for the section 419A(f)(6) exception to sections 419 and 419A.

Use of Insurance Contracts

A number of commentators expressed concern with the results under the proposed regulations when the definition of an experience-rating arrangement was applied to a plan which provides for contributions equal to the premiums on a whole life insurance contract or other life insurance contract having level premiums. These commentators asserted that the purchase of such policies is not inconsistent with the requirements of section 419A(f)(6) and that, if the premiums under the contract are established using standardized actuarial factors (including issue age), the arrangement is not experience rated.

The final regulations retain the definition of experience rating arrangement and the general results that flow from the application of that definition to a level premium life insurance policy. This analysis recognizes that if whole life insurance contracts, or other insurance contracts that provide for level premiums or otherwise generate a savings element, are purchased under an arrangement, the economic values reflected under those contracts (including cash values, reserves, and any other economic values, such as conversion credits, high dividend rates, or the right to continue coverage at a premium that is lower than the premium that would apply in the absence of that savings element) are based on the excess of the premiums paid over the underlying mortality and related expense charges for providing the insurance and, hence, reflect the overall experience of the employers and employees who participate under the plan.

If those economic values are used to determine the current cost of coverage for that employer (as opposed to being shared among all of the employers participating in the plan), the employer can anticipate that its past contributions in excess of incurred losses for claims for its employees will inure to the benefit of the employer or its employees (as opposed to the other employers participating in the plan). This assurance that the employer or its employees will benefit from favorable past experience is the hallmark of an experience-rating arrangement.[2]

[2] The existence of experience rating in a level premium life insurance arrangement can be viewed not only from the perspective of overall experience, but also from that of claims experience. For example, assume that Employer A and Employer B have the same number of employees, and the employees of A have the same ages and other risk factors as those of B. If, on the same day in Year 1, each employer purchases from the same insurer the same amount of level premium whole life insurance coverage for each of its employees, the aggregate premium charges for A and B will be equal. Further, assume that in Year 5, A's employee who is age 60 dies, and is replaced by an individual who is also age 60 and has identical risk characteristics. A purchases a new level premium whole life insurance contract of the same amount for the new employee who has an issue age of 60.

Furthermore, Congress' expectation that employers participating in 10 or more employer plans would have no financial incentive to over-contribute was the basis for providing the section 419A(f)(6) exception from the deduction limits of sections 419 and 419A. Allowing a 10 or more employer plan to use insurance contracts with retained values, where a participating employer can benefit directly or indirectly from the retained values generated with respect to its employees (*e.g.*, through enhanced benefits to its employees), would provide a financial incentive for the employer to over-contribute to the plan and, thus, would be contrary to the premise underlying the intent of Congress in providing the exception. This financial incentive can be seen most clearly in a flexible premium universal life contract, which is almost indistinguishable from the welfare benefit fund that Congress intended to be subject to the deduction limitations of sections 419 and 419A. The fact that the premiums on a whole life contract or other level premium arrangement are fixed ahead of time (at least with respect to individual employees) does not alter the fact that the buildup of cash value is essentially the same as the accumulation of assets in a fund. The result is the same even where there is no cash value, if the arrangement uses overpayments in earlier years to levelize the premiums. In all these cases, the retained values of life insurance contracts relating to an employer's employees are used to determine that employer's cost of coverage, and the conclusion remains that there is an experience-rating arrangement of the type not allowed by section 419A(f)(6).

Some commentators asserted that the definition of experience-rating arrangements in the proposed regulations will preclude the use of cash value life insurance under section 419A(f)(6) and will therefore eviscerate the section 419A(f)(6) exception. Neither section 419A(f)(6) nor these regulations regulate the investments of a welfare benefit fund, including investments by a trust in cash value policies. Instead, section 419A(f)(6) and the regulations are concerned with the economic relationship between a fund and participating employers, and whether the pass-through of premiums based on the insurance contracts associated with an employer's employees has the effect of creating experience-rating arrangements with respect to individual employers. Moreover, the IRS and Treasury also believe that the exception is still viable for many life and health benefit arrangements that are self-insured in accordance with the Employee Retirement Income Security Act of 1974 (ERISA) or state law. Under these types of arrangements, the employers contribute the expected cost of claims for their employees. Without the section 419A(f)(6) exception, the deduction for these contributions would be limited to the welfare benefit fund's qualified cost for the taxable year. The section 419A(f)(6) exception allows these employers to deduct those contributions without regard to whether the employees actually incurred claims.

A number of commentators cited to other provisions under sections 419 and 419A for support for their position that a plan can provide for accumulations within a welfare benefit fund that are effectively allocated to the employees without causing the plan to be ineligible for the section 419A(f)(6) exception. The Service and Treasury believe that these other provisions are not relevant in the determination of whether a plan provides an experience rating arrangement. For example, the fact that section 419(e)(4) specifically excludes certain insurance contracts (including contracts that provide experience rated refunds or policy dividends) from the definition of fund for purposes of section 419 does not necessarily mean that such contracts may be held within a welfare benefit fund while retaining the section 419A(f)(6) exception. Similarly, the fact that section 419A(c)(2) permits an additional reserve for post-retirement medical and life insurance benefits does not mean that such a reserve would not cause the plan to violate the prohibition on experience rating under section 419A(f)(6).

Special Rules of Application

The final regulations retain the special rules of application relating to insurance contracts that were set forth in the proposed regulation. For example, insurance contracts under an arrangement are treated as assets of the fund, and the fund will be treated as having either a gain or loss with respect to those contracts.

Another special rule is provided in the case of a plan maintaining an experience-rating arrangement with respect to a group of participating employers or a group of employees covered under the plan (a rating group). Under that rule, a plan will not be treated as maintaining an experience-rating arrangement with respect to an individual employer merely because the cost of coverage under a plan with respect to the employer is based, in whole or in part, on the benefits experience or the overall experience (or a proxy for either type of experience) of a rating group that includes the employer or one or more of its employees, provided that the employer does not normally contribute more than 10 percent of all contributions with respect to that rating group. The effect of this rule is to allow the plan to provide for experience rating on a plan-wide basis or on the basis of a subset of the employers within the plan, provided that the subset of employers is not overweighted by the experience of one employer and is not defined based on the experience of the employers.

Characteristics Indicating a Plan Is Not Described in Section 419A(f)(6)

These regulations also identify five characteristics that are indications that an employer's interest with respect to the plan is more similar to the relationship of an individual employer to a fund than an insured to an insurer. (See, H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1155 (1984), 1984–3 C.B. (Vol. 2) 1, 413.) The presence of some of these characteristics in a plan suggests that there are multiple plans present instead of a single plan. The presence of others tends to indicate that an employer's cost of coverage is (or will be) based on that employer's benefits experience. Others tend to indicate that the plan is expected to accumulate a surplus that ultimately will be used for the benefit of the individual employers (or their employees). One way this surplus might be used would be to reduce future contributions for the individual employers based on past contributions or claims of the employers. Another way would be to pay benefits to an employer's employees based on the employer's share of the surplus on the occasion of the withdrawal of the employer or at plan termination, thereby violating the rule that an employer's cost of coverage cannot be based on its overall experience. Accordingly, these regulations provide that a plan exhibiting any of these characteristics is not a 10 or more employer plan described in section 419A(f)(6) unless it is established to the satisfaction of the Commissioner that the plan satisfies the requirements of section 419A(f)(6) and these proposed regulations. It should be noted that the fact that a plan has none

A's premiums for the new 60-year-old employee will now be higher than those of B for its employee corresponding to the 60-year-old who died, because B's premiums for its 60-year-old employee are based on an issue age of 55. A's premiums for its other employees will be the same as those for B's corresponding employees. Thus, after the death of its employee, A's aggregate premium charges are higher than those of B, and this is due solely to the fact that A's employees have incurred claims in excess of the claims of B's employees.

of these characteristics does not create an inference that it is a 10 or more employer plan described in section 419A(f)(6).

The first, third and fourth characteristics under the proposed regulations indicating that a plan is not a 10 or more employer plan described in section 419A(f)(6) (*i.e.,* the assets of the plan are allocated among the participating employers through a separate accounting of contributions and expenditures for individual employers or otherwise, the plan does not provide for fixed welfare benefits for a fixed coverage period for a fixed price or the plan charges the participating employers an unreasonably high amount for the covered risk) have been retained without change.

The second characteristic under the proposed regulations indicating that a plan is not a 10 or more employer plan described in section 419A(f)(6) is that amounts charged under the plan differ among the employers in a manner that is not reflective of differences in risk or rating factors that are commonly taken into account in manual rates used by insurers (such as age, gender, dependents covered, geographic locale, or benefit terms). In response to comments, this second characteristic has been clarified so that the exception for reflection of differences in risk or rating factors commonly taken into account in manual rates is limited to differences in charges that are merely reflective of differences in current risk (such as current age, gender, dependents covered, geographic locale, or benefit terms). Accordingly, an arrangement that charges different amounts for life insurance based on issue age would exhibit this second characteristic, unless the differences in amount charged are merely reflective of differences in risk or rating factors at the current age (*e.g.,* reflecting select and ultimate mortality).

The fifth characteristic under the proposed regulation indicating that a plan is not a 10 or more employer plan described in section 419A(f)(6) is that benefits or other amounts payable can be provided upon triggering events other than the illness, personal injury, or death of an employee or family member, or the employee's involuntary termination of employment. A number of commentators expressed concern that this fifth characteristic effectively prohibits a termination of a welfare benefit arrangement or otherwise redefines what is a welfare benefit arrangement. This concern reflects a misreading of the regulations, as this fifth characteristic does not prohibit the payment of benefits upon termination of the arrangement or withdrawal of an employer from the arrangement [3] or in any other way seek to redefine what is a permitted welfare benefit. Instead the characteristic reflects the inherent difficulty an insurer would have in determining an actuarially appropriate price for providing fixed benefits on the occasion of these non-standard benefit triggers and the associated likelihood that the amount of the benefits payable on such an occasion is being determined based on the overall experience of the employee or employer. The fact that some commentators have suggested that an employer be able to ''spin-off'' the employer's ''share'' of a fund is further indication that many plans that purport to fit within the section 419A(f)(6) exception are engaging in prohibited experience rating.

Taxpayers are reminded that a plan that exhibits one of these characteristics may still establish that the plan satisfies the requirements of section 419A(f)(6). For example, in the case of a plan that provides for a benefit to be provided on the occasion of an employer's withdrawal from the plan, the plan would have to demonstrate that the amount provided to an employee is not based on the benefits experience or the overall experience of the employee or the employer. In addition, in response to comments, the final regulations clarify that a plan does not exhibit this fifth characteristic merely because, upon cessation of participation in the plan, an employee is provided with the right to convert coverage under a group life insurance contract to coverage under an individual life insurance contract without demonstrating evidence of insurability, but only if there is no additional economic value associated with the conversion right.

The examples in the proposed regulations illustrating the application of the rules regarding experience-rating arrangements to specific fact situations are included in the final regulations, with minor changes, and two additional examples have been included. The facts described in some of the examples illustrate arrangements that do not maintain experience-rating arrangements with respect to individual employers. Other examples, however, describe arrangements that exhibit the characteristics of a fund that Congress intended to be subject to the deduction limitations of sections 419 and 419A. Each example illustrates only the application of the definition of experience-rating arrangements under section 419A(f)(6) and these regulations, and no inference should be drawn from the scope of the examples about whether these plans are otherwise described in section 419A(f)(6) or about any other provision of the Code.[4]

Pursuant to the authority set forth in section 419A(i), the regulations provide a special rule to assist participating employers and the Commissioner in verifying that the arrangement satisfies the section 419A(f)(6) requirements. Under that rule, an arrangement satisfies the requirements of section 419A(f)(6) and the regulations only if the plan is maintained pursuant to a written document that (1) requires the plan administrator to maintain records sufficient for the Commissioner or any participating employer to readily verify the plan's compliance with section 419A(f)(6) and (2) provides the Commissioner and each participating employer with the right to inspect and copy all such records.

Effective Date

Except as explained below, these regulations—which generally clarify existing law—are effective for contributions paid or incurred in taxable years of an employer beginning on or after July 11, 2002. For contributions made before this effective date, the IRS will continue applying existing law, including the analysis set forth in Notice 95–34 and relevant case law. Thus, taxpayers should not infer that a contribution that would be nondeductible under the regulations would be deductible if made before that date. In this regard, taxpayers are reminded that the IRS has already identified transactions that are the same as or substantially similar to the transactions described in Notice 95–34 as *listed transactions* for purposes of § 1.6011–4T(b)(2) of the Temporary Income Tax Regulations and § 301.6111–2T(b)(2) of the Temporary Procedure and Administration Regulations.

The requirement that written plan documents contain specified provisions relating to compliance information and the record maintenance requirement for plan administrators are effective for

[3] A withdrawal of an employer merely terminates the arrangement for that employer, but it continues for the other employers.

[4] For example, in *Neonatology Associates, P.A.,* v. *Commissioner,* 299 F.3d 221 (3d Cir. 2002), affirming 115 T.C. 43 (2000), the Court held that the contributions were in a large part constructive dividends to the employee/owners (and thus did not reach the government's alternative contention that the plan was maintaining experience-rating arrangements with respect to individual employers). In *Booth* v. *Commissioner,* 108 T.C. 524 (1997), the Tax Court held that the arrangement was an aggregation of separate plans (and thus was not a single plan) and that there were experience-rating arrangements with respect to the individual employers.

taxable years of a welfare benefit fund beginning after July 17, 2003. Existing record retention requirements and record production requirements under section 6001 continue to apply to employers and promoters.

Special Analyses

It has been determined that these regulations are not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory assessment is not required. It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) does not apply to these regulations.

It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. The collections of information in the regulation are in § 1.419A(f)(6)–1(a)(2) and (e) and consist of the requirements that a plan administrator maintain certain information and that it provide that information upon request to the Commissioner and to employers participating in the plan. This certification is based on the fact that requests for such information are likely to be made, on average, less than once per year per employer and that the costs of maintaining and providing this information are small. In addition, relatively few small entities are plan administrators. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was sent to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Betty J. Clary, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.419A(f)(6)–1 is also issued under 26 U.S.C. 419A(i). * * *

■ **Par. 2.** Section 1.419A(f)(6)–1 is added to read as follows:

§ 1.419A(f)(6)–1 Exception for 10 or more employer plan.

(a) *Requirements*—(1) *In general.* Sections 419 and 419A do not apply in the case of a welfare benefit fund that is part of a 10 or more employer plan described in section 419A(f)(6). A plan is a 10 or more employer plan described in section 419A(f)(6) only if it is a single plan—

(i) To which more than one employer contributes;

(ii) To which no employer normally contributes more than 10 percent of the total contributions contributed under the plan by all employers;

(iii) That does not maintain an experience-rating arrangement with respect to any individual employer; and

(iv) That satisfies the requirements of paragraph (a)(2) of this section.

(2) *Compliance information.* A plan satisfies the requirements of this paragraph (a)(2) if the plan is maintained pursuant to a written document that requires the plan administrator to maintain records sufficient for the Commissioner or any participating employer to readily verify that the plan satisfies the requirements of section 419A(f)(6) and this section and that provides the Commissioner and each participating employer (or a person acting on the participating employer's behalf) with the right, upon written request to the plan administrator, to inspect and copy all such records. See § 1.414(g)–1 for the definition of plan administrator.

(3) *Application of rules*—(i) *In general.* The requirements described in paragraph (a)(1) and (2) of this section must be satisfied both in form and in operation.

(ii) *Arrangement is considered in its entirety.* The determination of whether a plan is a 10 or more employer plan described in section 419A(f)(6) is based on the totality of the arrangement and all related facts and circumstances, including any related insurance contracts. Accordingly, all agreements and understandings (including promotional materials and policy illustrations) and the terms of any insurance contract will be taken into account in determining whether the requirements are satisfied in form and in operation.

(b) *Experience-rating arrangements*—(1) *General rule.* A plan maintains an experience-rating arrangement with respect to an individual employer and thus does not satisfy the requirement of paragraph (a)(1)(iii) of this section if, with respect to that employer, there is any period for which the relationship of contributions under the plan to the benefits or other amounts payable under the plan (the *cost of coverage*) is or can be expected to be based, in whole or in part, on the benefits experience or overall experience (or a proxy for either type of experience) of that employer or one or more employees of that employer. For purposes of this paragraph (b)(1), an employer's contributions include all contributions made by or on behalf of the employer or the employer's employees. *See* paragraph (d) of this section for the definitions of *benefits experience, overall experience, and benefits or other amounts payable.* The rules of this paragraph (b) apply under all circumstances, including employer withdrawals and plan terminations.

(2) *Adjustment of contributions.* An example of a plan that maintains an experience-rating arrangement with respect to an individual employer is a plan that entitles an employer to (or for which the employer can expect) a reduction in future contributions if that employer's overall experience is positive. Similarly, a plan maintains an experience-rating arrangement with respect to an individual employer where an employer can expect its future contributions to be increased if the employer's overall experience is negative. A plan also maintains an experience-rating arrangement with respect to an individual employer where an employer is entitled to receive (or can expect to receive) a rebate of all or a portion of its contributions if that employer's overall experience is positive or, conversely, where an employer is liable to make additional contributions if its overall experience is negative.

(3) *Adjustment of benefits.* An example of a plan that maintains an experience-rating arrangement with respect to an individual employer is a plan under which benefits for an employer's employees are (or can be expected to be) increased if that employer's overall experience is positive or, conversely, under which benefits are (or can be expected to be) decreased if that employer's overall experience is negative. A plan also maintains an experience-rating arrangement with respect to an

individual employer if benefits for an employer's employees are limited by reference, directly or indirectly, to the overall experience of the employer (rather than having all the plan assets available to provide the benefits).

(4) *Special rules*—(i) *Treatment of insurance contracts*—(A) *In general.* For purposes of this section, insurance contracts under the arrangement will be treated as assets of the fund. Accordingly, the value of the insurance contracts (including non-guaranteed elements) is included in the value of the fund, and amounts paid between the fund and the insurance company are disregarded, except to the extent they generate gains or losses as described in paragraph (b)(4)(i)(C) of this section.

(B) *Payments to and from an insurance company.* Payments from a participating employer or its employees to an insurance company pursuant to insurance contracts under the arrangement will be treated as contributions made to the fund, and amounts paid under the arrangement from an insurance company will be treated as payments from the fund.

(C) *Gains and losses from insurance contracts.* As of any date, if the sum of the benefits paid by the insurer and the value of the insurance contract (including non-guaranteed elements) is greater than the cumulative premiums paid to the insurer, the excess is treated as a gain to the fund. As of any date, if the cumulative premiums paid to the insurer are greater than the sum of the benefits paid by the insurer and the value of the insurance contract (including non-guaranteed elements), the excess is treated as a loss to the fund.

(ii) *Treatment of flexible contribution arrangements.* Solely for purposes of determining the cost of coverage under a plan, if contributions for any period can vary with respect to a benefit package, the Commissioner may treat the employer as contributing the minimum amount that would maintain the coverage for that period.

(iii) *Experience rating by group of employers or group of employees.* A plan will not be treated as maintaining an experience-rating arrangement with respect to an individual employer merely because the cost of coverage under the plan with respect to the employer is based, in whole or in part, on the benefits experience or the overall experience (or a proxy for either type of experience) of a rating group, provided that no employer normally contributes more than 10 percent of all contributions with respect to that rating group. For this purpose, a rating group means a group of participating employers that includes the employer or a group of employees covered under the plan that includes one or more employees of the employer.

(iv) *Family members, etc.* For purposes of this section, contributions with respect to an employee include contributions with respect to any other person (*e.g.*, a family member) who may be covered by reason of the employee's coverage under the plan and amounts provided with respect to an employee include amounts provided with respect to such a person.

(v) *Leased employees.* In the case of an employer that is the recipient of services performed by a leased employee described in section 414(n)(2) who participates in the plan, the leased employee is treated as an employee of the recipient and contributions made by the leasing organization attributable to service performed with the recipient are treated as made by the recipient.

(c) *Characteristics indicating a plan is not a 10 or more employer plan*—(1) *In general.* The presence of any of the characteristics described in paragraphs (c)(2) through (c)(6) of this section generally indicates that the plan is not a 10 or more employer plan described in section 419A(f)(6). Accordingly, unless established to the satisfaction of the Commissioner that the plan satisfies the requirements of section 419A(f)(6) and this section, a plan having any of the following characteristics is not a 10 or more employer plan described in section 419A(f)(6). A plan's lack of all the following characteristics does not create any inference that the plan is a 10 or more employer plan described in section 419A(f)(6).

(2) *Allocation of plan assets.* Assets of the plan or fund are allocated to a specific employer or employers through separate accounting of contributions and expenditures for individual employers, or otherwise.

(3) *Differential pricing.* The amount charged under the plan is not the same for all the participating employers, and those differences are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers (such as current age, gender, geographic locale, number of covered dependents, and benefit terms) for the particular benefit or benefits being provided.

(4) *No fixed welfare benefit package.* The plan does not provide for fixed welfare benefits for a fixed coverage period for a fixed cost, within the meaning of paragraph (d)(5) of this section.

(5) *Unreasonably high cost.* The plan provides for fixed welfare benefits for a fixed coverage period for a fixed cost, but that cost is unreasonably high for the covered risk for the plan as a whole.

(6) *Nonstandard benefit triggers.* Benefits or other amounts payable can be paid, distributed, transferred, or otherwise provided from a fund that is part of the plan by reason of any event other than the illness, personal injury, or death of an employee or family member, or the employee's involuntary separation from employment. Thus, for example, a plan exhibits this characteristic if the plan provides for the payment of benefits or the distribution of an insurance contract to an employer's employees on the occasion of the employer's withdrawal from the plan. A plan will not be treated as having the characteristic described in this paragraph merely because, upon cessation of participation in the plan, an employee is provided with the right to convert coverage under a group life insurance contract to coverage under an individual life insurance contract without demonstrating evidence of insurability, but only if there is no additional economic value associated with the conversion right.

(d) *Definitions.* For purposes of this section:

(1) *Benefits or other amounts payable.* The term *benefits or other amounts payable* includes all amounts that are payable or distributable (or that will be otherwise provided) directly or indirectly to employers, to employees or their beneficiaries, or to another fund as a result of a spinoff or transfer, and without regard to whether payable or distributable as welfare benefits, cash, dividends, rebates of contributions, property, promises to pay, or otherwise.

(2) *Benefits experience.* The *benefits experience* of an employer (or of an employee or a group of employers or employees) means the benefits and other amounts incurred, paid, or distributed (or otherwise provided) directly or indirectly, including to another fund as a result of a spinoff or transfer, with respect to the employer (or employee or group of employers or employees), and without regard to whether provided as welfare benefits, cash, dividends, credits, rebates of contributions, property, promises to pay, or otherwise.

(3) *Overall experience*—(i) *Employer's overall experience.* The term *overall experience* means, with respect to an employer (or group of employers), the balance that would have accumulated in a welfare benefit fund if that employer (or those employers) were the only employer (or employers) providing welfare benefits under the plan. Thus, the overall experience is credited with

the sum of the contributions under the plan with respect to that employer (or group of employers), less the benefits and other amounts paid or distributed (or otherwise provided) with respect to that employer (or group of employers) or the employees of that employer (or group of employers), and adjusted for gain or loss from insurance contracts (as described in paragraph (b)(4)(i) of this section), investment return, and expenses. Overall experience as of any date may be either a positive or a negative number.

(ii) *Employee's overall experience.* The term *overall experience* means, with respect to an employee (or group of employees, whether or not employed by the same employer), the balance that would have accumulated in a welfare benefit fund if the employee (or group of employees) were the only employee (or employees) being provided welfare benefits under the plan. Thus, the overall experience is credited with the sum of the contributions under the plan with respect to that employee (or group of employees), less the benefits and other amounts paid or distributed (or otherwise provided) with respect to that employee (or group of employees), and adjusted for gain or loss from insurance contracts (as described in paragraph (b)(4)(i) of this section), investment return, and expenses. Overall experience as of any date may be either a positive or a negative number.

(4) *Employer.* The term *employer* means the employer whose employees are participating in the plan and those employers required to be aggregated with the employer under section 414(b), (c), or (m).

(5) *Fixed welfare benefit package*—(i) *In general.* A plan provides for fixed welfare benefits for a fixed coverage period for a fixed cost, if it—

(A) Defines one or more welfare benefits, each of which has a fixed amount that does not depend on the amount or type of assets held by the fund;

(B) Specifies fixed contributions to provide for those welfare benefits; and

(C) Specifies a coverage period during which the plan agrees to provide specified welfare benefits, subject to the payment of the specified contributions by the employer.

(ii) *Treatment of actuarial gains or losses.* A plan will not be treated as failing to provide for fixed welfare benefits for a fixed coverage period for a fixed cost merely because the plan does not pay the promised benefits (or requires all participating employers to make proportionate additional contributions based on the fund's shortfall) when there are insufficient assets under the plan to pay the promised benefits. Similarly, a plan will not be treated as failing to provide for fixed welfare benefits for a fixed coverage period for a fixed cost merely because the plan provides a period of extended coverage after the end of the coverage period with respect to employees of all participating employers at no cost to the employers (or provides a proportionate refund of contributions to all participating employers) because of the plan-wide favorable actuarial experience during the coverage period.

(e) *Maintenance of records.* The plan administrator of a plan that is intended to be a 10 or more employer plan described in section 419A(f)(6) shall maintain permanent records and other documentary evidence sufficient to substantiate that the plan satisfies the requirements of section 419A(f)(6) and this section. (*See* § 1.414(g)–1 for the definition of plan administrator.)

(f) *Examples.* The provisions of paragraph (c) of this section and the provisions of section 419A(f)(6) and this section relating to experience-rating arrangements may be illustrated by the following examples. Unless stated otherwise, it should be assumed that any life insurance contract described in an example is non-participating and has no value other than the value of the policy's current life insurance protection plus its cash value, and that no employer normally contributes more than 10 percent of the total contributions contributed under the plan by all employers. Paragraph (ii) of each example applies the characteristics listed in paragraph (c) of this section to the facts described in that example. Paragraphs (iii) and (iv) of each example analyze the facts described in the example to determine whether the plan maintains experience-rating arrangements with respect to individual employers. Paragraphs (iii) and (iv) of each example illustrate only the meaning of *experience-rating arrangements.* No inference should be drawn from these examples about whether these plans are otherwise described in section 419A(f)(6) or about the applicability or nonapplicability of any other Internal Revenue Code provision that may limit or deny the deduction of contributions to the arrangements. Further, no inference should be drawn from the examples concerning the tax treatment of employees as a result of the employer contributions or the provision of the benefits. The examples are as follows:

Example 1. (i) An arrangement provides welfare benefits to employees of participating employers. Each year a participating employer is required to contribute an amount equal to the claims and other expenses expected with respect to that employer for the year (based on current age, gender, geographic locale, number of participating employees, benefit terms, and other risk or rating factors commonly taken into account in manual rates used by insurers for the benefits being provided), multiplied by the ratio of actual claims with respect to that employer for the previous year over the expected claims with respect to that employer for the previous year.

(ii) This arrangement exhibits at least one of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). Differential pricing exists under this arrangement because the amount charged under the plan is not the same for all the participating employers, and those differences are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers for the particular benefit or benefits being provided.

(iii) This arrangement does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Under the arrangement, an employer's cost of coverage for each year is based, in part, on that employer's benefits experience (*i.e.*, the benefits and other amounts provided in the past with respect to one or more employees of that employer). Accordingly, pursuant to paragraph (b)(1) of this section, the arrangement maintains experience-rating arrangements with respect to individual employers.

Example 2. (i) The facts are the same as in *Example* 1, except that the amount charged to an employer each year is equal to claims and other expenses expected with respect to that employer for the year (determined the same as in *Example 1*), multiplied by the ratio of actual claims for the previous year (determined on a plan-wide basis) over the expected claims for the previous year (determined on a plan-wide basis).

(ii) Based on the limited facts described above, this arrangement exhibits none of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). Unlike the arrangement discussed in *Example 1*, there is no differential pricing under the arrangement because the only differences in the amounts charged to the employers are solely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers for the particular benefit or benefits being provided.

(iii) Nothing in the facts described in this *Example 2* indicates that the arrangement maintains experience-rating arrangements prohibited under section 419A(f)(6) and this section. An employer's cost of coverage under the arrangement is based, in part, on the benefits experience of that employer (as well as of all the other participating

employers). However, pursuant to paragraph (b)(4)(iii) of this section, the arrangement will not be treated as maintaining experience-rating arrangements with respect to the individual employers merely because the employers' cost of coverage is based on the benefits experience of a group of employees eligible under the plan, provided no employer normally contributes more than 10 percent of all contributions with respect to the rating group that includes the employees of an individual employer. Under the arrangement described in this *Example 2*, the rating group includes all the participating employers (or all of their employees), and no employer normally contributes more than 10 percent of the contributions made under the arrangement by all the employers. Accordingly, absent other facts, the arrangement will not be treated as maintaining experience-rating arrangements with respect to individual employers.

Example 3. (i) Arrangement A provides welfare benefits to employees of participating employers. Each year an employer is required to contribute an amount equal to the claims and other expenses expected with respect to that employer for the year (based on current risk or rating factors commonly taken into account in manual rates used by insurers for the benefits being provided), adjusted based on the employer's notional account. An employer's notional account is determined as follows. The account is credited with the sum of the employer's contributions previously paid under the plan less the benefit claims for that employer's employees. The notional account is further increased by a fixed five percent investment return (regardless of the actual investment return earned on the funds). If an employer's notional account is positive, the employer's contributions are reduced by a specified percentage of the notional account. If an employer's notional account is negative, the employer's contributions are increased by a specified percentage of the notional account.

(ii) Arrangement A exhibits at least two of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, assets under the plan are allocated to specific employers. Second, differential pricing exists because the amount charged under the plan is not the same for all the participating employers, and those differences are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers for the particular benefit or benefits being provided.

(iii) Arrangement A does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Under the arrangement, a participating employer's cost of coverage for each year is based on a proxy for that employer's overall experience. An employer's *overall experience*, as that term is defined in paragraph (d)(3) of this section, includes the balance that would have accumulated in the fund if that employer's employees were the only employees being provided benefits under the plan. Under that definition, the overall experience is credited with the sum of the contributions paid under the plan by or on behalf of that employer less the benefits or other amounts provided to with respect to that employer's employees, and adjusted for gain or loss from insurance contracts, expenses, and investment return. Under the formula used by the arrangement in this example to determine employer contributions, expenses are disregarded and a fixed investment return of five percent is used instead of actual investment return. The disregard of expenses and substitution of the fixed investment return for the actual investment return merely results in an employer's notional account that is a proxy for the overall experience of that employer. Accordingly, the arrangement maintains experience-rating arrangements with respect to individual employers.

Example 4. (i) Under Arrangement B, death benefits are provided for eligible employees of each participating employer. Individual level premium whole life insurance policies are purchased to provide the death benefits. Each policy has a face amount equal to the death benefit payable with respect to the individual employee. Each year, a participating employer is charged an amount equal to the level premiums payable with respect to the employees of that employer. One participating employer, F, has an employee, P, whose coverage under the arrangement commenced at the beginning of 2000, when P was age 50. P is covered under the arrangement for $1 million of death benefits, and a life insurance policy with a face amount of $1 million has been purchased on P's life. The level annual premium on the policy is $23,000. At the beginning of 2005, when P is age 55, the $23,000 premium amount has been paid for five years and the policy, which continues to have a face amount of $1 million, has a cash value of $92,000. Another employer, G, has an employee, R, who is also 55 years old at the beginning of 2005 and is covered under Arrangement B for $1 million, for which a level premium life insurance policy with a face amount of $1 million has been purchased. However, R did not become covered under Arrangement B until the beginning of 2005. Because R's coverage began at age 55, the level annual premium charged for the policy on R's life is $30,000, or $7,000 more than the premiums payable on the policy in effect on P's life. Employer F is charged $23,000 and employer G is charged $30,000 for the death benefit for employees P and R, respectively. Assume that employees P and R are the only covered employees of their respective employers and that they are identical with respect to current risk and rating factors that are commonly taken into account in manual rates used by insurers for death benefits.

(ii) Arrangement B exhibits at least three of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, assets of the plan are effectively allocated to specific employers. Second, there is differential pricing under the arrangement. That is, the amount charged under the plan during the year for a specific amount of death benefit coverage is not the same for all the employers (employer F is charged $23,000 each year for $1 million of death benefit coverage while employer G is charged $30,000 each year for the same coverage), and the difference is not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers for the death benefit being provided. (The differences in amounts charged are attributable to differences in issue age and not to differences in current risk or rating factors, as employees P and R are the same age). Third, during the early years of the arrangement, the amounts charged are unreasonably high for the covered risk for the plan as a whole.

(iii) Arrangement B does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Arrangement B maintains experience-rating arrangements with respect to individual employers because the cost of coverage for each year for any employer participating in the arrangement is based on a proxy for the overall experience of that employer. Under Arrangement B, employer F's cost of coverage for 2005 is $23,000 for $1 million of coverage. The $92,000 cash value at the beginning of 2005 in the policy insuring P's life is a proxy for employer F's overall experience. (The $92,000 is essentially the balance that would have accumulated in the fund if employer F were the only employer providing welfare benefits under Arrangement B.) Further, the $23,000 charged to F for the $1 million of coverage in 2005 is based on the $92,000 since, in the absence of the $92,000, employer F would have been charged $30,000 for P's $1 million death benefit coverage. (Note that the conclusion that the $92,000 balance is the basis for the lower premium charged to employer F is consistent with the fact that a $92,000 balance, if converted to a life annuity using the same actuarial assumptions as were used to calculate the cash value amount, would be sufficient to provide for annual annuity payments of $7,000 for the life of P—an amount equal to the $7,000 difference from the premium charged in 2005 to employer G for the $1 million of coverage on employee R's life.) Thus, F's cost of coverage for 2005 is based on a proxy for F's overall experience. Accordingly, Arrangement B maintains an experience-rating arrangement with respect to employer F.

(iv) Arrangement B also maintains an experience-rating arrangement with respect to employer G because it can be expected that each year G will be charged $30,000 for the $1 million of coverage on R's life. Each year, G's cost of coverage will reflect G's prior contributions and allocable earnings, so that G's cost of coverage will be based on a proxy for G's overall experience. Accordingly, Arrangement B maintains an experience-rating arrangement with respect to employer G. Similarly, Arrangement B maintains an experience-rating arrangement with respect to each other participating employer. Accordingly, Arrangement B maintains experience-rating arrangements with respect to individual employers. This would also be

the result if Arrangement B maintained an experience-rating arrangement with respect to only one individual employer.

Example 5. (i) The facts are the same as in *Example 4* except that the death benefits are provided under 10-year level term life insurance policies. One participating employer, H, has an employee, M, whose coverage under the arrangement commenced at the beginning of 2000, when M was age 35. M is covered under the arrangement for $1 million of death benefits, and a 10-year level term life insurance policy with a face amount of $1 million has been purchased on M's life. The level annual premium on the policy for the first 10 years is $700. At the beginning of 2007, when M is age 42, the $700 premium amount has been paid for seven years. Another employer, J, has an employee, N, who is also 42 years old at the beginning of 2007 and is covered under the arrangement for $1 million, for which a 10-year level term life insurance policy with a face amount of $1 million has been purchased. However, N did not become covered under the arrangement until the beginning of 2007. Because N's coverage began at age 42, the 10-year level term premium charged for the policy on N's life is $1,100, or $400 more than the premiums then payable on the policy in effect on M's life. Neither the policy on employee M nor the policy on employee N has any cash value at any point during its term. Assume that employees M and N are the only covered employees of their respective employers and that they are identical with respect to any current risk and rating factors that are commonly taken into account in manual rates used by insurers for the death benefit being provided.

(ii) Based on the facts described in this *Example 5*, this arrangement exhibits at least two of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, for the same reasons as described in paragraph (ii) of *Example 4*, there is differential pricing under the arrangement. Second, assets of the plan are effectively allocated to specific employers. This is the case even though the insurance policies used by employers H and J have no accessible cash value.

(iii) The facts described in this *Example 5* indicate that the arrangement does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. This arrangement maintains experience-rating arrangements with respect to individual employers because the cost of coverage for each year for any employer participating in the arrangement is based on a proxy for the overall experience of that employer. Under this arrangement employer H's cost of coverage in 2007 is $700 for $1 million of coverage. Although the policy insuring M's life has no cash value accessible to employer H, the accumulation of the excesses of the amounts paid by employer H on behalf of employee M over each year's underlying mortality and expense charges for providing life insurance coverage to employee M provide economic value to employer H (*i.e.*, the ability to purchase future coverage on M's life at a premium that is less than the underlying mortality and expense charges as those underlying charges increase with M's increasing age). Thus, H's cost of coverage for 2007 is based on a proxy for H's overall experience. Accordingly, this arrangement maintains an experience-rating arrangement with respect to employer H.

(iv) This arrangement also maintains an experience-rating arrangement with respect to employer J because it can be expected that for each of the next nine years J will be charged $1,100 for the $1 million of coverage on N's life. Each year, J's cost of coverage will reflect J's prior contributions, so that J's cost of coverage will be based on a proxy for J's overall experience. Accordingly, this arrangement maintains an experience-rating arrangement with respect to employer J. Similarly, this arrangement maintains an experiencing-rating arrangement with respect to each other participating employer. Accordingly, this arrangement maintains experience-rating arrangements with respect to individual employers. This would also be the result if this arrangement maintained an experience-rating arrangement with respect to only one individual employer.

Example 6. (i) Under Arrangement C, death benefits are provided for eligible employees of each participating employer. Flexible premium universal life insurance policies are purchased to provide the death benefits. Each policy has a face amount equal to the death benefit payable with respect to the individual employee. Each participating employer can make any contributions to the arrangement provided that the amount paid for each employee is at least the amount needed to prevent the lapse of the policy. The amount needed to prevent the lapse of the universal life insurance policy is the excess, if any, of the mortality and expense charges for the year over the policy balance. All contributions made by an employer are paid as premiums to the universal life insurance policies purchased on the lives of the covered employees of that employer. Participating employers S and V each have a 50-year-old employee covered under Arrangement C for death benefits of $1 million, which is the face amount of the respective universal life insurance policies on the lives of the employees. In the first year of coverage employer S makes a contribution of $23,000 (the amount of a level premium) while employer V contributes only $6,000, which is the amount of the mortality and expense charges for the first year. At the beginning of year two, the balance in employer S's policy (including earnings) is $18,000, but the balance in V's policy is zero. Although S is not required to contribute anything in the second year of coverage, S contributes an additional $15,000 in the second year. Employer V contributes $7,000 in the second year.

(ii) Arrangement C exhibits at least two of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, assets of the plan are effectively allocated to specific employers. Second, the arrangement does not provide for fixed welfare benefits for a fixed coverage period for a fixed cost.

(iii) Arrangement C does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Arrangement C maintains experience-rating arrangements with respect to individual employers because the cost of coverage of an employer participating in the arrangement is based on a proxy for the overall experience of that employer. Pursuant to paragraph (b)(4)(ii) of this section (concerning treatment of flexible contribution arrangements), solely for purposes of determining an employer's cost of coverage, the Commissioner may treat an employer as contributing the minimum amount needed to maintain the coverage. Applying this treatment, H's cost of coverage for the first year of coverage under Arrangement C is $6,000 for $1 million of death benefit coverage, but for the second year it is zero for the same amount of coverage because that is the minimum amount needed to keep the insurance policy from lapsing. Employer H's overall experience at the beginning of the second year of coverage is $18,000, because that is the balance that would have accumulated in the fund if H were the only employer providing benefits under Arrangement C. (The special rule of paragraph (b)(4)(ii) of this section only applies to determine cost of coverage; it does not apply in determining overall experience.) The $18,000 balance in the policy insuring the life of employer H's employee is a proxy for H's overall experience. Employer H can choose not to make any contributions in the second year of coverage due to the $18,000 policy balance. Thus, H's cost of coverage for the second year is based on a proxy for H's overall experience. Accordingly, Arrangement C maintains an experience-rating arrangement with respect to employer H.

(iv) Arrangement C also maintains an experience-rating arrangement with respect to employer J because in each year J can contribute more than the amount needed to prevent a lapse of the policy on the life of its employee and can expect that its cost of coverage for subsequent years will reflect its prior contributions and allocable earnings. Accordingly, Arrangement C maintains an experience-rating arrangement with respect to employer J.

Example 7. (i) Arrangement D provides death benefits for eligible employees of each participating employer. Each employer can choose to provide a death benefit of either one, two, or three times the annual compensation of the covered employees. Under Arrangement D, the death benefit is payable only if the employee dies while employed by the employer. If an employee terminates employment with the employer or if the employer withdraws from the arrangement, the death benefit is no longer payable, no refund or other credit is payable to the employer or to the employees, and no policy or other property is transferrable to the employer or the employees. Furthermore, the employees are not provided with any right under Arrangement D to coverage under any other arrangement, nor with any right to purchase or to convert to an individual insurance policy, other than any conversion rights the employees may have in accordance with state law (and which provide no

additional economic benefit). Arrangement D determines the amount required to be contributed by each employer for each month of coverage by aggregating the amount required to be contributed for each covered employee of the employer. The amount required to be contributed for each covered employee is determined by multiplying the amount of the death benefit coverage (in thousands) for the employee by five-year age bracket rates in a table specified by the plan, which is used uniformly for all covered employees of all participating employers. The rates in the specified table do not exceed the rates set forth in Table I of § 1.79–3(d)(2), and differences in the rates in the table are merely reflective of differences in mortality risk for the various age brackets. The rates in the table are not based in whole or in part on the experience of the employers participating in Arrangement D. Arrangement D uses the amount contributed by each employer to purchase one-year term insurance coverage on the lives of the covered employees with a face amount equal to the death benefit provided by the plan. No employer is entitled to any rebates or refunds provided under the insurance contract.

(ii) Arrangement D does not exhibit any of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). Under Arrangement D, assets are not allocated to a specific employer or employers. Differences in the amounts charged to the employers are solely reflective of differences in risk or rating factors that are commonly taken into account in manual rates used by insurers for the particular benefit or benefits being provided. The arrangement provides for fixed welfare benefits for a fixed coverage period for a fixed cost, within the meaning of paragraph (d)(5) of this section. The cost charged under the arrangement is not unreasonably high for the covered risk of the plan as a whole. Finally, benefits and other amounts payable can be paid, distributed, transferred, or otherwise made available only by reason of the death of the employee, so that there is no nonstandard benefit trigger under the arrangement.

(iii) Nothing in the facts of this *Example 7* indicates that Arrangement D fails to satisfy the requirements of section 419A(f)(6) or this section by reason of maintaining experience-rating arrangements with respect to individual employers. Based solely on the facts described above, Arrangement D does not maintain an experience rating-arrangement with respect to any individual employer because for each participating employer there is no period for which the employer's cost of coverage under the arrangement is based, in whole or in part, on either the benefits experience or the overall experience (or a proxy for either type of experience) of that employer or its employees.

Example 8. (i) The facts are the same as in *Example 7*, except that under the arrangement, any refund or rebate provided under that year's insurance contract is allocated among all the employers participating in the arrangement in proportion to their contributions, and is used to reduce the employers' contributions for the next year.

(ii) This arrangement exhibits at least one of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). The arrangement includes nonstandard benefit triggers because amounts are made available to an employer by reason of the insurer providing a refund or rebate to the plan, an event that is other than the illness, personal injury, or death of an employee or family member, or an employee's involuntary separation from employment.

(iii) Based on the limited and specific facts described in this *Example 8,* an employer participating in this arrangement should be able to establish to the satisfaction of the Commissioner that the plan does not maintain experience-rating arrangements with respect to individual employers. A participating employer's cost of coverage is the relationship of its contributions to the death benefit coverage or other amounts payable with respect to that employer, including the employer's portion of the insurance company rebate and refund amounts. The rebate and refund amounts are allocated to an employer based on that employer's contribution for the prior year. However, even though an employer's overall experience includes its past contributions, contributions alone are not a proxy for an employer's overall experience under the particular facts described in this Example 8. As a result, a participating employer's cost of coverage under the arrangement for each year (or any other period) is not based on that employer's benefits experience or its overall experience (or a proxy for either type of experience), except as follows: If the total of the insurance company refund or rebate amounts is a proxy for the overall experience of all participating employers, a participating employer's cost of coverage will be based in part on that employer's overall experience (or a proxy therefor) by reason of that employer's overall experience being a portion of the overall experience of all participating employers. Under the special rule of paragraph (b)(2)(iii) of this section, however, that fact alone will not cause the arrangement to be treated as maintaining an experience-rating arrangement with respect to an individual employer because no employer normally contributes more than 10 percent of the total contributions under the plan by all employers (the rating group). Accordingly, the arrangement will not be treated as maintaining experience-rating arrangements with respect to individual employers.

Example 9. (i) Arrangement E provides medical benefits for covered employees of 90 participating employers. The level of medical benefits is determined by a schedule set forth in the trust document and does not vary by employer. Other than any rights an employee may have to COBRA continuation coverage, the medical benefits cease when an employee terminates employment with the employer. If an employer withdraws from the arrangement, there is no refund of any contributions and there is no transfer of anything of value to employees of the withdrawing employer, to the withdrawing employer, or to another plan or arrangement maintained by the withdrawing employer. Arrangement E determines the amount required to be contributed by each employer for each year of coverage, and the aggregate amounts charged are not unreasonably high for the covered risk for the plan as a whole. To determine the amount to be contributed for each employer, Arrangement E classifies an employer based on the employer's location. These geographic areas are not changed once established under the arrangement. The amount charged for the coverage under the arrangement to the employers in a geographic area is determined from a rate-setting manual based on the benefit package and geographic area, and differences in the rates in the manual are merely reflective of current differences in those risk or rating factors. The rates in the rate-setting manual are not based in whole or in part on the experience of the employers participating in Arrangement E.

(ii) Arrangement E does not exhibit any of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). Although the amounts charged under the arrangement to an employer in one geographic area can be expected to differ from those charged to an employer in another geographic area, the differences are merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers for medical benefits.

(iii) Nothing in the facts of this *Example 9* indicates that Arrangement E fails to satisfy the requirements of section 419A(f)(6) or this section by reason of maintaining experience-rating arrangements with respect to individual employers. Based solely on the facts described above, Arrangement E does not maintain an experience rating-arrangement with respect to any individual employer because for each participating employer there is no period for which the employer's cost of coverage under the arrangement is based, in whole or in part, on either the benefits experience or the overall experience (or a proxy for either type of experience) of that employer or its employees.

Example 10. (i) The facts are the same as in *Example 9,* except that the amount charged for the coverage under the arrangement to the employers in a geographic area is initially determined from a rate-setting manual based on the benefit package and then adjusted to reflect the claims experience of the employers in that classification as a whole. The arrangement does not have any geographic area classification for which one of the employers in the classification normally contributes more than 10 percent of the contributions made by all the employers in that classification.

(ii) This arrangement exhibits at least one of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). There is differential pricing under the arrangement because the amounts charged to an employer

in one geographic area can be expected to differ from those charged to an employer in another geographic area, and the differences are not merely reflective of current risk or rating factors that are commonly taken into account in manual rates used by insurers for medical benefits.

(iii) Based on the facts described in this *Example 10,* an employer participating in this arrangement should be able to establish to the satisfaction of the Commissioner that the plan does not maintain experience-rating arrangements with respect to individual employers even though there is differential pricing. Although an employer's cost of coverage for each year is based, in part, on its benefits experience (as well as the benefits experience of the other employers in its geographic area), that does not result in experience-rating arrangements with respect to any individual employer because the employers in each geographic area are a rating group and no employer normally contributes more than 10 percent of the contributions made by all the employers in its rating group. (See paragraph (b)(4)(iii) of this section.)

Example 11. (i) The facts of Arrangement F are the same as those described in *Example 10,* except that K, an employer in one of Arrangement F's geographic areas, normally contributes more than 10 percent of the contributions made by the employers in that geographic area.

(ii) For the same reasons as described in *Example 10,* Arrangement F results in differential pricing.

(iii) Arrangement F does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. An employer's cost of coverage for each year is based, in part, on its benefits experience (as well as the benefits experience of the other employers in its geographic area) and the special rule for experience-rating by a rating group does not apply to Arrangement F because employer K normally contributes more than 10 percent of the contributions made by the employers in its rating group. Accordingly, Arrangement F maintains experience-rating arrangements with respect to individual employers.

Example 12. (i) The facts of Arrangement G are the same as those described in Example 10, except for the way that the arrangement classifies the employers. Under Arrangement G, the experience of each employer for the prior year is reviewed and then the employer is assigned to one of three classifications (low cost, intermediate cost, or high cost) based on the ratio of actual claims with respect to that employer to expected claims with respect to that employer. No employer in any classification normally contributes more than 10 percent of the contributions of all employers in that classification.

(ii) For the same reasons as described in *Example 10,* Arrangement G results in differential pricing.

(iii) Arrangement G does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. The special rule in paragraph (b)(4)(iii) of this section for rating groups can prevent a plan from being treated as maintaining experience-rating arrangements with respect to individual employers if the mere use of a rating group is the only reason a plan would be so treated. Under Arrangement G, however, an employer's cost of coverage for each year is based on the employer's benefits experience in two ways: the employer's benefits experience is part of the benefits experience of a rating group that is otherwise permitted under the special rule of paragraph (b)(4)(iii) of this section, and the employer's benefits experience is considered annually in redetermining the rating group to which the employer is assigned. Accordingly, Arrangement G maintains experience-rating arrangements with respect to individual employers.

Example 13. (i) Arrangement H provides a death benefit equal to a multiple of one, two, or three times compensation as elected by the participating employer for all of its covered employees. Universal life insurance contracts are purchased on the lives of the covered employees. The face amount of each contract is the amount of the death benefit payable upon the death of the covered employee. Under the arrangement, each employer is charged annually an amount equal to 200 percent of the mortality and expense charges under the contracts for that year covering the lives of the covered employees of that employer. Arrangement H pays the amount charged each employer to the insurance company. Thus, the insurance company receives an amount equal to 200 percent of the mortality and expense charges under the policies. The excess amounts charged and paid to the insurance company increase the policy value of the universal life insurance contracts. When an employer ceases to participate in Arrangement H, the insurance policies are distributed to each of the covered employees of the withdrawing employer.

(ii) Arrangement H exhibits at least three of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, assets are effectively allocated to specific employers. Second, because the amount of the withdrawal benefit (*i.e.,* the value of the life insurance policies to be distributed) is unknown, the arrangement does not provide for fixed welfare benefits for a fixed coverage period for a fixed cost. Finally, Arrangement H includes nonstandard benefit triggers because amounts can be distributed under the arrangement for a reason other than the illness, personal injury, or death of an employee or family member, or an employee's involuntary separation from employment.

(iii) Arrangement H does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Pursuant to paragraph (b)(1) of this section, the prohibition against maintaining experience-rating arrangements applies under all circumstances, including employer withdrawals. Arrangement H maintains experience-rating arrangements with respect to individual employers because the cost of coverage for a participating employer is based on a proxy for the overall experience of that employer. Under Arrangement H, the contributions of a participating employer are fixed. The benefits or other amounts payable with respect to an employer include the value of the life insurance policies that are distributable to the employees of that employer upon the withdrawal of that employer from the plan. Thus, the cost of coverage for any period of an employer's participation in Arrangement H is the relationship between the fixed contributions for that period and the variable benefits payable under the arrangement. The value of those variable benefits depends on the value of the policies that would be distributed if the employer were to withdraw at the end of the period. (Each year the insurance policies to be distributed to the employees in the event of the employer's withdrawal will increase in value due to the premium amounts paid on the policy in excess of current mortality and expense charges.) For reasons similar to those discussed above in Example 6, the aggregate value of the life insurance policies on the lives of an employer's employees is a proxy for that employer's overall experience. Thus, a participating's employer's cost of coverage for any period is based on a proxy for the overall experience of that employer. Accordingly, Arrangement H maintains experience-rating arrangements with respect to individual employers.

(iv) The result would be the same if, rather than distributing the policies, Arrangement H distributed cash amounts equal to the cash values of the policies. The result would also be the same if the distribution of policies or cash values is triggered by employees terminating their employment rather than by employers ceasing to participate in the arrangement.

Example 14. (i)(1) The facts of Arrangement J are the same as those described in *Example 13* for Arrangement H, except that—

(A) Arrangement J purchases a special term insurance policy on the life of each covered employee with a face amount equal to the death benefit payable upon the death of the covered employee; and

(B) there is no benefit distributable upon an employer's withdrawal.

(2) The special term policy includes a rider that extends the term protection for a period of time beyond the term provided on the policy's face. The length of the extended term is not guaranteed, but is based on the excess of premiums over mortality and expense charges during the period of original term protection, increased by any investment return credited to the policies.

(ii) Arrangement J exhibits two of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, assets of the plan are effectively allocated to specific employers. Second, the plan does not provide for fixed welfare benefits for a

fixed coverage period for a fixed cost because the coverage period is not fixed.

(iii) Arrangement J does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Arrangement J maintains experience-rating arrangements with respect to individual employers because the cost of coverage for a participating employer is based on a proxy for the overall experience of that employer. Under Arrangement J, the contributions of a participating employer are fixed. The benefits or other amounts payable with respect to an employer are the one-, two-, or three-times-compensation death benefit for each employee of the employer for the current year, plus the extended term protection coverage for future years. Thus, for any period extending to or beyond the end of the original term of one or more of the policies on the lives of an employer's employees, the employer's cost of coverage is the relationship between the fixed contributions for that period and the variable benefits payable under the arrangement. The value of those variable benefits depends on the aggregate value of the policies insuring the employer's employees (*i.e.,* the total of the premiums paid on the policies by Arrangement J to the insurance company, reduced by the mortality and expense charges that were needed to provide the original term protection, and increased by any investment return credited to the policies). The aggregate value of the policies insuring an employer's employees is, at any time, a proxy for the employer's overall experience. Thus, a participating employer's cost of coverage for any period described above is based on a proxy for the overall experience of that employer. Accordingly, Arrangement J maintains experience-rating arrangements with respect to individual employers.

Example 15. (i) Arrangement K provides a death benefit to employees of participating employers equal to a specified multiple of compensation. Under the arrangement, a flexible-premium universal life insurance policy is purchased on the life of each covered employee in the amount of that employee's death benefit. Each policy has a face amount equal to the employee's death benefit under the arrangement. Each participating employer is charged annually with the aggregate amount (if any) needed to maintain the policies covering the lives of its employees. However, each employer is permitted to make additional contributions to the arrangement and, upon doing so, the additional contributions are paid to the insurance company and allocated to one or more contracts covering the lives of the employer's employees. In the event that any policy covering the life of an employee would lapse in the absence of new contributions from that employee's employer, and if at the same time there are policies covering the lives of other employees of the employer that have cash values in excess of the amounts needed to prevent their lapse, the employer has the option of reducing its otherwise-required contribution by amounts withdrawn from those other policies.

(ii) Arrangement K exhibits at least two of the characteristics listed in paragraph (c) of this section generally indicating that an arrangement is not a 10 or more employer plan described in section 419A(f)(6). First, assets of the plan are allocated to specific employers. Second, because the plan allows an employer to choose to contribute an amount that is different than that contributed by another employer for the same benefit, the amount charged under the plan is not the same for all participating employers (and the differences in the amounts are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers for the particular benefit or benefits being provided), resulting in differential pricing.

(iii) Arrangement K does not satisfy the requirements of section 419A(f)(6) and this section because, at a minimum, the requirement of paragraph (a)(1)(iii) of this section is not satisfied. Arrangement K maintains experience-rating arrangements with respect to individual employers because the cost of coverage for any employer participating in the arrangement is based on a proxy for the overall experience of that employer. Under Arrangement K the benefits with respect to an employer for any year are a fixed amount. For purposes of determining the employer's cost of coverage for that year, the Commissioner may treat the employer's contribution under the special rule of paragraph (b)(4)(ii) of this section (concerning treatment of flexible contribution\arrangements) as being the minimum contribution amount needed to maintain the universal life policies with respect to that employer for the death benefit coverage for that year. Because the employer has the option to prevent the lapse of one policy by having amounts withdrawn from other policies, that minimum contribution amount will be based in part on the aggregate value of the policies on the lives of that employer's employees. That aggregate value is a proxy for the employer's overall experience. Accordingly, Arrangement K maintains experience-rating arrangements with respect to individual employers.

(g) *Effective date*—(1) *In general.* Except as set forth in paragraph (g)(2) of this section, this section applies to contributions paid or incurred in taxable years of an employer beginning on or after July 11, 2002.

(2) *Compliance information and recordkeeping.* Paragraphs (a)(1)(iv), (a)(2), and (e) of this section apply for taxable years of a welfare benefit fund beginning after July 17, 2003.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 3.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 4.** In § 602.101, paragraph (b) is amended by adding an entry in numerical order to the table to read as follows:

§ 602.101 OMB control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.419A(f)(6)–1	1545–1795
* * * * *	

Robert E. Wenzel,

Deputy Commissioner for Services and Enforcement.

Approved: July 9, 2003.

Pamela F. Olson,

Assistant Secretary of the Treasury.

[FR Doc. 03–18041 Filed 7–16–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY–228–FOR]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving, with the exception of one provision, a proposed amendment to the Kentucky regulatory program (the ''Kentucky program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Kentucky proposed revisions to the Kentucky Administrative Regulations (KAR) at 8/16/18:001 definitions of ''impounding structure, ''impoundment,'' and ''other treatment facilities;'' at 16/18:090 sections 1 through 5; at 16/18:100; and at 16/18:160 pertaining to sedimentation ponds and impoundments. Kentucky revised its program to be consistent with the corresponding Federal regulations.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: William J. Kovacic, Telephone: (859)260–8400. Internet address: *bkovacic@osmre.gov.*

SUPPLEMENTARY INFORMATION:

1. Background on the Kentucky Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Kentucky program on May 18, 1982. You can find background information on the Kentucky program, including the Secretary's findings, the disposition of comments, and conditions of approval in the May 18, 1982, **Federal Register** (47 FR 21404). You can also find later actions concerning Kentucky's program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16 and 917.17.

2. Submission of the Proposed Amendment

By letter dated July 30, 1997 (administrative record no. KY–1410), Kentucky sent us a proposed amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). The amendment revises 405 KAR at sections 8:001, 8:030, 8:040, 16:001, 16:060, 16:090, 16:100, 16:160, 18:001, 18:060, 18:090, 18:100, 18:160, and 18:210.

We announced receipt of the proposed amendment in the September 5, 1997, **Federal Register** (62 FR 46933), and in the same document invited public comment period and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on October 6, 1997. On November 14, 1997, a Statement of Consideration of public comments was filed with the Kentucky Legislative Research Committee. As a result of the comments and by letter dated March 4, 1998, Kentucky made changes to the original submission (administrative record no. KY–1422). The revisions were made at 405 KAR 8:040, 16:060, 18:060, and 18:210. By letter dated March 16, 1998, Kentucky made additional changes to the original submission (administrative record no. KY–1423). The revisions were made at 8:001, 8:030, 8:040, 16:001, 16:060, 16:090, 16:100, 16:160, 18:001, 18:060, 18:090, 18:100, 18:160, and 18:210. By letter dated July 14, 1998, Kentucky submitted a revised version of the proposed amendments (administrative record no. KY–1431). All the revisions, except for a portion of those submitted March 16, 1998, were announced in the August 26, 1998, **Federal Register** (63 FR 45430).

During our review of the amendment, we identified concerns relating to the provisions at 405 KAR 8:001, 8:030, 8:040, 16:001, 16:060, 16:090, 16:100, 16:160, 18:001, 18:060, 18:090, 18:100, 18:160, and 18:210. We notified Kentucky of the concerns by letter dated May 26, 2000 (administrative record no. KY–1479). Kentucky responded in a letter dated August 10, 2000, and submitted additional explanatory information (administrative record no. KY–1489). The explanatory information and those revisions not included in previous notices were announced in the June 5, 2002, **Federal Register** (67 FR 38621).

By letter dated June 25, 2002 (administrative record no. KY–1544), Kentucky sent us a proposed change to 405 KAR 16/18:090, by adding section 6, which established performance standards for ''other treatment facilities.'' We announced this proposed revision in the August 16, 2002, **Federal Register** (67 FR 53540). In a letter dated October 30, 2002 (administrative record no. KY–1568), Kentucky sent us a final version of 405 KAR 16/18:090 section 6 as well as non-substantive changes to 405 KAR 6/18:090 section 1(1), (2)(a) and (4); section 2; section 4 and section 5(2).

We addressed Kentucky's revisions to its subsidence control regulations at 405 KAR 18:210 in a **Federal Register** notice published on May 7, 2002 (67 FR 30549). In this rule, we will address only those revisions at 405 KAR 8/16/18:001 definitions of ''impounding structure,'' ''impoundment,'' and ''other treatment facilities,'' 16/18:090 sections 1 through 5, 16/18:100, and 16/18:160 pertaining to sedimentation ponds and impoundments. The minor revisions to 16/18:090 submitted by Kentucky on October 30, 2002, will not be discussed in this rule. The October 30, 2002, revisions and any other remaining revisions to the Kentucky regulations not previously addressed, will be in a future **Federal Register** notice (KY–216) or in a recently approved notice (KY–241).

3. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment with the exception of one provision. Also, we are removing a required amendment at 30 CFR 917.16(d)(4). Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes.

(a) Minor Revisions to Kentucky's Rules

Kentucky proposed minor wording, editorial, punctuation, grammatical, and recodification changes to the following previously-approved rules.

State rule	Subject	Federal counterpart
405 KAR 16:090 section 5(7)/18:090 section 5(8)	Sedimentation Ponds	30 CFR 816/817.46
405 KAR 16/18:100 section 2(1)	Impoundments	30 CFR 816/817.49(b)(1)
405 KAR 16/18:160 section 3(1), 3(1)(e)	Impoundments	30 CFR 816/817.84

Because the changes are minor, we find that they will not make Kentucky's rules less effective than the corresponding Federal regulations.

(b) Revisions to Kentucky's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations.

Kentucky proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations.

State rule	Subject	Federal counterpart
405 KAR 8:001/16:001 section 1 (50)/18:001 section 1 (52)	Impounding Structure	30 CFR 701.5
405 KAR 8:001/16:001 section 1 (51)/18:001 section 1 (53)	Impoundment	30 CFR 701.5
405 KAR 16:001 section 1 (69)/18:001 section 1 (72)	Other Treatment Facilities	30 CFR 701.5
405 KAR 16/18:160 section 3(1) (a)	Coal Mine Waste Impoundments	30 CFR 816/817.84(b)(2)
405 KAR 16/section 3(3) 18:160	Coal Mine Waste Impoundments	30 CFR 816/817.84(e)
405 KAR 16/18:160 section 4	Coal Mine Waste Impoundments	30 CFR 816/817.84(f)

(c) Revisions to Kentucky's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

1. *405 KAR 16/18:090.* At section 1, subsections (1) through (3), Kentucky is requiring that sedimentation ponds comply with its impoundment regulations at 405 KAR 16/18:100. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.46(b)(4), which require the compliance with the impoundment regulations at 30 CFR 816/817.49 since sections 405 KAR 16/18:100 are Kentucky's counterpart to the Federal regulations at 30 CFR 816/817.49. Additionally, Kentucky requires that sedimentation ponds must be designed and certified by a qualified registered professional engineer as meeting Kentucky's sedimentation ponds and impoundment requirements; and be inspected during construction by or under the direct supervision of the responsible registered professional engineer, and after construction be certified by the engineer as having been constructed in accordance with the approved design plans. The sedimentation pond must also be constructed and certified before any disturbance in the watershed that drains into the sedimentation pond. Kentucky is deleting the requirements at former subsections (3) and (4) that sedimentation ponds meet the criteria of these regulations and that they be removed unless approved for retention. These requirements can be found at revised sections 1(1) and 5(6), respectively. While Kentucky requires the construction of the sedimentation ponds before any disturbance in the watershed that drains into the sedimentation pond and the Federal rule requires construction before any surface mining activities are conducted, both rules serve the same purpose to ensure that ''any mining activities in a new drainage area'' will have in place adequate siltation structures. 48 FR 44032–44037 (September 26, 1983) (emphasis added). Accordingly, we find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.46(b)(3) and (4), which require that siltation structures be constructed before beginning any surface mining activities in that area and be designed, certified, constructed, and maintained as approved in the reclamation plan.

At section 2, Kentucky is requiring that plans for clean-out operations include a time schedule or clean-out elevations, or an appropriate combination thereof, that provides periodic sediment removal sufficient to maintain adequate volume for the sediment to be collected during the design precipitation under section 3. This language replaces a requirement that sediment storage volume be the anticipated volume of sediment that will be collected by the pond between scheduled clean-out operations. The Federal rules at 816/817.46(c)(1)(iii)(F) require periodic sediment removal sufficient to maintain adequate volume for the design precipitation event. Thus, the only difference between Kentucky's proposed language and the Federal rules is that Kentucky allows the permittee to choose between alternative methods to maintain adequate sediment storage volume. Since the permittee must maintain adequate volume, we find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.46 (c)(1)(iii)(F).

At section 3, Kentucky is adding requirements that sedimentation ponds be designed, constructed, and maintained to: (1) contain the runoff from the 10-year, 24-hour precipitation event by providing a runoff storage volume, between the top elevation of the design sediment storage volume and the principal spillway elevation, equal to or greater than the runoff from that precipitation event. Kentucky may approve a smaller runoff storage volume based on the terrain, the amount of disturbance, other site-specific conditions, and a demonstration by the permittee that effluent limitations will be met; or (2) treat runoff from the 10-year, 24-hour precipitation event by using other treatment facilities in conjunction with adequate runoff storage volume so that effluent limitations will be met. The proposed revisions clarify that sedimentation ponds must meet the requirements at subsections (1) and (2) in order to provide detention time for the runoff from a precipitation event. The detention is necessary so the effluent limits for the water leaving the permit area can be met. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.46(c)(1)(iii)(B) and(C), which require that sedimentation ponds provide adequate detention time to allow the effluent from ponds to meet State and Federal effluent limitations, and contain or treat the 10-year, 24-hour precipitation event unless a lesser event is approved by the State.

At section 4, Kentucky is revising its dewatering regulations that pertain to dewatering devices or spillways. They cannot be located at a lower elevation than the top elevation of the design sediment storage volume. The Federal regulations at 30 CFR 816/817.46(c)(1)(iii)(D) require that

nonclogging dewatering devices be adequate to maintain specified detention times. Kentucky's proposed regulations at 405 KAR 16/18:090 section 3(1) address detention times and reference effluent limitations at 405 KAR 16/18:070. Therefore, we find that Kentucky's proposed regulations at 405 KAR 16/18:090 section 4, when read in conjunction with 405 KAR 16/18:090 section 3(1) and 405 KAR 16/18:070, are no less effective than the Federal regulations.

At section 5, Kentucky is deleting its existing regulations pertaining to sedimentation ponds at subsections (3)-(16) and (20). The remaining sections have been renumbered. In its letter dated August 10, 2000, Kentucky noted that the revisions described above were made because the same requirements appear at 405 KAR 16/18:100. We find that Kentucky's proposed deletions at 16/18:090 section 5, when read in conjunction with revised 405 KAR 16/18:090 and 16/18:100, are no less effective than the Federal regulations at 30 CFR 816/817.46 and 816/817.49. Additionally, at subsections (4) and (5), Kentucky is adding requirements that sediment be removed in accordance with the approved clean-out plan and that spillways be provided in accordance with 405 KAR 16/18:100. We find these additions are consistent with changes that we are approving and are no less effective than the Federal rules at 30 CFR 816/817.46(c).

2. *405 KAR 16/18:100.* At section 1, subsection (1)(a), Kentucky is referencing compliance with permit application requirements as they pertain to the submission of the Mine Safety and Health Administration (MSHA)-approved impoundment plans. At section 1, subsections (3)(a) 1, Kentucky is now adding Class B and C impoundments to its performance standard that requires Class B and C impoundments, as well as other impoundments, to have a minimum static safety factor of 1.5 and a seismic safety factor of 1.2. The Federal rules at 30 CFR 816/817.49(a)(4) also require impoundments meeting the Class B or C criteria found in the Soil Conservation Service's (SCS) (now known as the Natural Resources Conservation Service) Technical Release No. 60 (TR–60) to meet a minimum static safety factor of 1.5 and a seismic safety factor of 1.2. However, Kentucky does not refer to TR–60 with regard to its Class B and C impoundments. In its letter dated August 10, 2000, Kentucky stated its Class B and C criteria (at 405 KAR 7:040 section 5 and 401 KAR 4:030) and those of TR–60 are virtually identical. Further, Kentucky stated that its criteria were developed based on the SCS criteria, making a reference to TR–60 unnecessary. Kentucky's criteria are substantively identical to the TR–60 criteria. Therefore, based on the criteria found in Kentucky's regulations, we find that Kentucky's proposed regulations are no less effective than the Federal regulations, if Kentucky does not change its reference criteria at 405 KAR 7:040 section 5 and 401 KAR 4:030. We are also removing the required amendment at 30 CFR 917.16(d)(4), which directed Kentucky to require that all C class impoundments have a minimum static safety factor of 1.5 and all other impoundments have a minimum static safety factor of 1.3 or meet specific design criteria no less effective than the standard. Kentucky is also adding a requirement that all impoundments not included in subsection (3)(a) 1, except coal mine waste impoundments, shall have a minimum static safety factor of 1.3 for the normal pool with steady state seepage saturation conditions. This language is substantively identical to and no less effective than the Federal rules at 30 CFR 816/817.49(a)(4)(ii).

At section 1, subsections (5)(a) 2, Kentucky is now adding Class B and C impoundments to its performance standard that requires Class B and C impoundments, as well as other impoundments to have foundation investigations. This is substantively identical to and no less effective than the Federal rules at 30 CFR 816/817.49(a)(6).

At section 1(6), Kentucky is requiring that a 24-hour event may be used in lieu of a 6-hour event for the duration of a design precipitation event specified in subsection (6). OSM previously evaluated this issue for the design of spillways. In an OSM memorandum dated March 15, 1990, the results of a computer modeling analysis done for various types of watershed configurations typical to the coal fields of Kentucky were summarized (administrative record no. KY–1581). The computer modeling indicated the peak discharge for a 24-hour duration precipitation event was higher than the peak discharge for a 6-hour event having the same return period and would require a larger spillway than the 6-hour event. The proposed language is no less effective than the Federal regulations at 30 CFR 816/817.49(a)(9)(ii). At subsections (6)(a)1 and 2, Kentucky is requiring that Class A structures not meeting MSHA criteria pass: a 25-year, 6-hour precipitation event if it is a temporary structure; a 50-year, 6-hour precipitation event if it is a permanent structure; or a 100-year, 6-hour event if it does meet the MSHA criteria. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.49(a)(9)(ii)(C), which require a 25-year, 6-hour standard or greater as specified by the regulatory authority.

Kentucky is proposing two changes allowing exemptions from impoundment inspection/examination requirements. First, at subsection (9)(c), Kentucky is proposing to allow an exemption from the engineer inspection requirements of subsection (9) for an impoundment with no embankment structure, that is completely incised or is created by a depression left by backfilling and grading, that is not a sedimentation pond or coal mine waste impoundment and is not otherwise intended to facilitate active mining. If Kentucky determines, on a case-by-case basis that an engineering inspection and certification are necessary to ensure public health and safety or environmental conditions, it will establish appropriate inspection and certification requirements for the impoundment that will apply in lieu of the requirements of subsection (9) and will notify the permittee in writing.

This proposal constitutes a limited exemption from the State counterpart to the Federal regulations at 30 CFR 816/817.49(a)(11), which require that all impoundments be inspected by an engineer during construction, upon completion of construction and thereafter at least yearly. Following each inspection, a certified report shall be provided to the regulatory authority.

Second, Kentucky is proposing, at subsection (10)(b), to allow an exemption for impoundments not meeting the MSHA requirements of 30 CFR 77.216 or not meeting the Class B and C classifications, from qualified person examination requirements specified in subsection 10(b) for an impoundment with no embankment structure, that is completely incised, or is created by a depression left by backfilling and grading. This proposal constitutes an exemption from the State counterpart to the Federal regulations at 30 CFR 816/817.49(a)(12), which require that all impoundments not meeting the SCS Class B or C criteria or the criteria of 30 CFR 77.216–3, shall be examined quarterly.

The Federal regulations regarding inspection/examination of impoundments were adopted in 1979 and revised and strengthened in 1983 for the express purpose of identifying structural weakness, instability, or other hazardous conditions so that potential hazards might be addressed and emergency procedures implemented in

order to ''properly ensure protection of health and safety of all persons as well as the protection of the environment.'' 48 FR 43994–44000 (September 26, 1983).

The criteria for approving proposed State program amendments are that they be no less effective than the Federal rule in meeting the requirements of SMCRA. We recognize that, since the regulations require the identification of potentially hazardous conditions, not conducting inspections/examinations where there is no potential for hazardous conditions is no less effective than conducting such inspections/examinations. The issue then, in deciding whether or not these two amendments can be approved, is whether or not there is a reasonable potential for hazardous conditions in the limited exemptions provided for in the proposals.

The issues related to impoundment inspection/examination requirements raised by these two proposals are not new. OSM has previously addressed the applicability of the impoundment inspection/examination requirements, particularly where there is no embankment, in ways with some relevance to the decisions on these two proposals.

In 1987, OSM issued Directive TSR–2, which states ''If an impoundment is constructed without an embankment, OSMRE policy will exempt these impoundments from the quarterly examination requirement [now 30 CFR 816.49(a)(12)] since there is no embankment to examine for structural weaknesses or other hazardous conditions.'' The Directive goes on to state that the decision as to which structures are exempt should be made on a case-by-case basis by the regulatory authority during the permitting process.

In September 1990, guidance was developed by the Technical Assistance Division of OSM's Eastern Field Operations Office specifically to assist Illinois in developing a limited exemption from the requirements of current 30 CFR 816.49(a)(11). This 1990 guidance addressed incised impoundments as well as impoundments which do not facilitate mining or reclamation and, under certain conditions, small non-hazardous impoundments with embankments. For incised impoundments, that guidance stated they should not equate to building an embankment-type dam and, for those with hydraulic gradients, there needs to be a demonstration by the operator that the impoundment poses no risk. For impoundments that don't facilitate mining or reclamation, there should be a showing that no drainage entering the impoundment would be from a disturbed area and the exiting drainage would not enter an impoundment that facilitates mining.

This guidance was referenced in the December 1991 **Federal Register** Notice approving Illinois' exemption for impounding structures, including those with embankments, designed for a water elevation not more than 5 feet above the upstream toe of the structure and with a storage volume of less than 20 acre-feet. To obtain, the exemption requires a certified engineer's report describing the hazard potential of the structure. The 1990 guidance was also relied on when OSM approved a proposed amendment to Indiana's program containing a similar limited exemption. In 1995, OSM issued Directive TSR–14, which is intended to promote the creation of wetlands, to supplement and enhance post-mining land use and address the perception that regulatory barriers prohibit such activities. The Directive notes that OSM's regulations (including specific reference to the impoundment regulations at issue here) allow and encourage construction of wetlands that supplement and enhance fish and wildlife habitat. It goes on to state that OSM's regulations provide three options to leave wetlands on completed mine sites; small depressions, fish and wildlife habitat, and impoundments. Thus, small depressions and fish and wildlife habitat are distinguished from impoundments and the inspection requirements that go with them.

Concerning small depressions, it also states that surface area and depth of water which would qualify as ''small'' are not defined by Federal rules. Therefore, ''depressions may be of any size compatible with the postmining land use and must not pose a safety risk associated with potential failure of an impoundment.'' It also states small depressions must be a dugout or basin as opposed to an embankment-type construction and that deep pits with steep sloping sides are not suitable small depressions for the purposes of wetland habitat. Regarding impoundments, it states that when the crest of a dam is reduced to the elevation necessary to only saturate the sediment to the extent necessary to sustain a wetland ecosystem and any possible safety issues have been eliminated, OSM would consider it a wetland constructed for wildlife enhancement rather than an impounding structure.

In 2000, OSM approved an amendment to the Colorado program waiving, for certain impoundments and in limited circumstances, the requirements for quarterly impoundment examinations and allowing the annual inspection to be conducted by a qualified person other than an engineer. To qualify for the waiver, the impoundment must either be completely incised or must not exceed two acre-feet in capacity nor have embankments larger than five feet in height measured from the bottom of the channel. In approving this amendment, OSM relied in part on Directive TSR–2 and also referenced the 1991 Illinois decision discussed above.

In 2001, OSM's Western region developed guidance for evaluation of small depressions under the Indian Lands program, which among other things, addressed the distinction between small depressions and impoundments.

We will now turn to the two exemptions Kentucky has proposed and discuss them separately. The proposed exemption from engineer inspection requirements to the State counterpart to 30 CFR 816.49(a)(11) has some overlap but does not match either the Illinois or Indiana approved exemptions.

Kentucky asserted in its letter dated August 10, 2000, that the proposed exemption is extremely limited and not available for impoundments that are sedimentation ponds, coal mine waste impoundments, or are otherwise intended to facilitate active mining. Since the impoundments subject to the exemption do not have embankments that could fail or present safety hazards or other environmental concerns, Kentucky does not see the need to require the impoundments be inspected or to have the certified reports prepared. There is some merit to that argument. Unfortunately, that validity of that argument does not extend as far as the exemption.

It is inappropriate to presume all incised impoundments, particularly larger impoundments or those in steeper slopes as occur in Eastern Kentucky, have no hazard potential. Even completely incised impoundments may pose a risk as discussed in OSM's 1990 guidance to Illinois. For example, an incised impoundment could pose a risk if the impoundment contained a substantial amount of water and was built out of material that could fail (such as bulked spoil or natural material of deep colluvium or alluvium). Most of Kentucky's coal mining operations are conducted in the mountainous region of Eastern Kentucky and not in Western Kentucky where the terrain is relatively flat and similar to the terrain in Illinois and Indiana. Another example is where the impoundment, which doesn't facilitate active mining, is upstream of and drains into a sedimentation pond.

In the mountainous area of Eastern Kentucky, such an impoundment could affect the performance of the downstream sedimentation pond. While Kentucky's proposed exemption allows for the possibility for inspections it does not require the demonstration of suitability for exemption from inspections prior to allowing the exemption.

It is not clear what is intended by the proposed amendment in relation to depressions left by backfilling and grading. Kentucky's guidelines for determining Approximate Original Contour (AOC) state all depressions, except small depressions, shall be eliminated (administrative record no. KY–1582). As noted above, OSM policy does not consider small depressions as impoundments and, therefore, no exemption is needed. Large depressions would be inconsistent with Kentucky's AOC guidance. It should be noted that Kentucky allows the construction of small depressions on backfilled areas under certain, limited circumstances and the regulations appear at 405 KAR 16/18:190 section 2(5)(a)–(e).

Accordingly, OSM is not approving Kentucky's proposed regulations at 16/18:100 section 1(9)(c) because they are less effective than the Federal regulations at 30 CFR 816/817.49(a)(11). However, this action should not be construed as applying those Federal inspection requirements to small depressions left or incisions made to facilitate construction of wetlands as a post-mining land use consistent with OSM's Directive TSR–14.

The second exemption proposed by Kentucky is to subsection (10)(b) and allows an exemption from examinations of impoundments with no embankment structure that are completely incised or created by a depression left by backfilling and grading but not meeting MSHA requirements set forth at 30 CFR 77.216 or not meeting the Class B and C classifications. The rationale for the change was because the impoundments are small, non-hazardous impoundments without embankment structures. (*See* Kentucky's letter dated August 10, 2000).

This is an exemption from the same examination requirement addressed in OSM Directive TSR–2 discussed above. The Colorado exemption discussed above also addressed this requirement. However, it also included small embankments and contained a rigorous case-by-case protocol to qualify for the exemption.

We concur in the rationale for this amendment since it is consistent with the rationale contained in Directive TSR–2. Our one concern with this proposal is that it does not address how determinations will be made on which impoundments qualify for the exemption. Directive TSR–2 states that the decision on which impoundments are exempt should be made on a case-by-case basis. We anticipate that in applying this exemption, Kentucky will consider, on a case-by-case basis, whether a particular structure meets the limitations of the exemption. That will include a determination that the impoundment does not meet the Class B or C impoundment hazard criteria.

Based on the above discussion, the Director finds that Kentucky's proposed rule at 405 KAR 16/18:100 section 1(10)(b) is not inconsistent with the Federal regulations at 30 CFR 816/817.49(a)(12) and we are approving the revision to the extent that it is implemented and managed in accordance with the provisions of OSM Directive TSR–2. Again, we note that we do not consider small depressions in the backfill as impoundments at issue in this decision and that other depressions should have been eliminated under Kentucky's AOC guidance.

3. *405 KAR 16/18:160.* At section 1(3), Kentucky is requiring that an impounding structure constructed of coal mine waste or intended to impound coal mine waste not be retained permanently as part of the approved postmining land use. Kentucky is also changing ''coal processing waste'' to ''coal mine waste'' in this and subsequent sections. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.84(b)(1), which prohibit the permanent retention of such structures. We also find Kentucky's change from the term ''coal processing waste'' to ''coal mine waste'' is consistent with the Federal rules at 30 CFR 816/817.81 *et seq.*, which use the term ''coal mine waste.''

At section 2(2), Kentucky is proposing to require that diversions be designed to carry the peak runoff from a 100-year, 6-hour precipitation event. Twenty-four hours may be used in lieu of six hours for the duration of the 100-year design precipitation event. The current regulations require a 100-year, 24-hour event. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.84(b) and (d). Please refer to the discussion presented at section 2 above for 405 KAR 16/18:100 section 1(6).

At section 3(1)(b) 1 through 4, Kentucky is proposing requirements for closed conduit principal spillways for impounding structures with a drainage area of 10 square miles or less without open channel emergency spillways. The impounding structure must have sufficient storage capacity to store the entire runoff from the probable maximum precipitation event while maintaining the required freeboard and disregarding flow through the principal spillway. In general, the spillway requirements ensure passing routed freeboard hydrograph peak discharges without clogging. The Federal rules at 30 CFR 816/817.49(a)(5) require that impoundments have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. The Kentucky rules also require that impounding structures maintain the required freeboard against overtopping. The Federal rules at 30 CFR 816/817.49(a)(9) also require that the spillways be designed and constructed to safely pass the applicable design precipitation event. Likewise, Kentucky requires that the conduit meet the probable maximum precipitation event and the impounding structure have sufficient storage capacity available to store the entire runoff from the probable maximum precipitation event, disregarding flow through the principal spillway. Additionally, Kentucky has specific requirements for spillways that are not specified in the rules. We find that Kentucky's proposed requirements are no less effective than the Federal regulations pertaining to freeboard and spillways at 30 CFR 816/817.49(a).

At section 3(1)(c), Kentucky is proposing that for impounding structures not meeting the criteria of 30 CFR 77.216(a), the maximum water elevation must be determined by the freeboard hydrograph criteria for the appropriate structure hazard classification under 405 KAR 7:040 section 5 and 401 KAR 4:030. The Federal regulations at 30 CFR 816/817.49(a)(5) require compliance with the criteria in the Minimum Emergency Spillway Hydrologic Criteria in TR–60. Kentucky's referenced regulations and the Kentucky regulations cross-reference to the Division of Water Engineering Memorandum No. 5 (2–1–75) achieve the same design precipitation values for the freeboard hydrograph criteria as does the Federal regulations. Therefore, based on Kentucky's referenced regulations and the Division of Water Engineering Memorandum No. 5, we find the proposed language at 3(1)(c) no less effective than 30 CFR 816/817.49(a)(5).

4. Summary and Disposition of Comments

Public Comments

We solicited public comments and provided an opportunity for a public hearing on the proposed amendment submitted on July 30, 1997, and revised on March 4, 1998, March 16, 1998, and July 14 1998. Because no one requested an opportunity to speak, a hearing was not held. The National Citizens' Coal Law Project, a part of Kentucky Resources Council, Inc. (KRC), submitted comments on several different occasions in response to the original Kentucky submission and the subsequent revisions. The comments are summarized below and organized by date of submission. Only those comments pertaining to the issues contained in this rule are included here.

July 11, 2002 (administrative record no. KY–1553)—the KRC addressed issues contained in OSM's May 26, 2000, issue letter and Kentucky's subsequent response on August 10, 2000. The remarks supplement previous comments on record by the KRC.

(a) 405 KAR 16/18:100 sections 1(9)(c) and 1(10)(b)—the KRC states that embankment failure is not the only mechanism that could cause release from impoundments and that the exemption from inspections for non-embankment impoundments should be disapproved. We agree. As stated in our findings at (c)2, we are not approving the proposed regulation at 1(9)(c) because even completely incised impoundments may have a hazard potential, for example, larger impoundments or those located in steep slopes. We are approving the proposed regulation at 1(10)(b) to the extent that it is implemented and managed in accordance with the provisions of OSM Directive TSR–2 dated September 14, 1987. As required in OSM Directive TSR–2, for impoundments that are to be considered for exemption from inspection, but were not included in the permit application, such as those created by a depression left by backfilling and grading, there will have to be case-by-case decisions made by Kentucky based on additional information specific to each impoundment being considered for exemption from quarterly examinations. This has to include, at a minimum, a certified report that the impoundment does not meet the Class B or C impoundment hazard criteria and there are no safety or environmental concerns.

(b) 405 KAR 16/18:160 section 3(1)(c)—the KRC states that a reference to TR–60 should be included in the Kentucky impoundment regulations. We agree that a reference to TR–60 or equivalent criteria should be included. As discussed in finding (c)3, we found Kentucky's reference to 405 KAR 7:040 section 5 and 405 KAR 4:030, and the Division of Water Engineering Memorandum No. 5 to be no less effective than 30 CFR 816/817.49 (a)(5). Therefore, adding a reference to TR–60 is not necessary.

December 9, 1998 (administrative record no. KY–1446)—the KRC addressed those changes submitted by Kentucky on November 14, 1997, and formally submitted to OSM on March 4, 1998.

(a) 405 KAR 16/18:090 section 3—the KRC notes that it sought and received clarification from Kentucky that the requirement that all drainage from disturbed areas pass through a sediment pond, and that the pond be constructed before any other disturbance, apply with equal force to other treatment facilities (administrative record no. KY–1431, November 14, 1997).

(b) 405 KAR 16/18:100 sections 1(9)(c) and 1(10)(b)—the KRC objected to the categorical exemption from engineering inspections at sections 1(9)(c) and 1(10)(b). We note that only section 1(9)(c) concerns exemption from engineering inspections. As noted above, we are disapproving section 1(9)(c).

(c) 405 KAR 16/18:100 section 1(1)(b)—the KRC states that the deletion of former 405 KAR 16:090 section 20 allows temporary structures, which fall within the definition of dams to avoid meeting the requirements of 405 KAR 7:040 section 5 and 401 KAR 4:030, since 405 KAR 16:100 section 1(1)(b) limits to ''permanent'' dams. The KRC suggested that the word ''permanent'' should be removed from the phrase ''permanent dams'' so as not to limit the applicability of the regulation. First, Kentucky's definition of ''dams'' at KRS 151.100 is less inclusive than Kentucky's definition of ''impoundments'', which is substantively identical to the Federal definition. We note that the complete language of 405 KAR 16/18:100 section 1(1)(b) reads, ''all impoundments classified as Class B-moderate or Class C-high hazard, and all permanent 'dams' as defined in KRS 151.00, shall comply with 405 KAR 7:040, section 5 and 401 KAR 4:030.'' All impoundments, temporary or permanent, meeting the specified criteria must meet the requirements. The retention of the word ''permanent'' does not, therefore, limit compliance.

(d) 405 KAR 16/18:160—the KRC supports the retention of requirements relating to minimum freeboard, vegetative matter removal, and spillway design. The KRC sought and received clarification from Kentucky that the use of the term ''coal mine waste,'' (rather than ''coal processing waste'') is not intended to allow use of underground development waste that is toxic or acid-forming, and that the natural slaking and combustion potential of the underground development waste will be accounted for in the assessment of embankment stability. Accordingly, since the KRC supports the language, no additional response is necessary.

October 6, 1997 (administrative record no. KY–1415)—the KRC submitted comments on several issues already addressed in the comment sections above.

Federal Agency Comments

According to 30 CFR 732.17(h)(11)(i), we solicited comments on the proposed amendment submitted on July 30, 1997, and revised on March 4, 1998, March 16, 1998, and July 14, 1998, from various Federal agencies with an actual or potential interest in the Kentucky program. The Department of Labor, Mine Safety and Health Administration, commented that the proposed amendment had no apparent impact on its program (administrative record nos. KY–1542 and KY–1554).

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). By letter dated June 6, 2000, we solicited EPA's comments and/or concurrence (administrative record no. KY–1477). The EPA submitted comments in a letter dated November 28, 2000 (administrative record no. KY–1501). Only those comments pertaining to the specific regulations included in this rule will be addressed here.

At 405 KAR 16/18:090 section 1, the EPA recommends that language be incorporated that specifically states that ''watershed disturbance'' include activities like timber harvesting and construction of haul roads. We note that Kentucky's proposed regulation is no less effective than the Federal regulations. Examples of activities are not necessary because Kentucky requires that sedimentation ponds be in place before any disturbance. We are not requiring that Kentucky further revise its regulations. The EPA also commented that there is little evidence

that sedimentation ponds are located as near as possible to the disturbed area and out of perennial streams unless otherwise approved. It recommends that applicants provide a rationale for pond location in the permit application. We note that this subsection was previously approved by OSM and not being revised at this time. The comment is, therefore, outside the scope of this rulemaking.

At section 2, the EPA suggests that the sediment pond proposed clean-out plan also include a description of the proposed disposal area to ensure that sensitive environmental resources are not adversely affected by disposal activities or erosion or sedimentation from the disturbed area. We note that the Federal regulations at 30 CFR 816/817.46(c) do not specify this requirement. Nonetheless, Kentucky's regulations at 16/18:060 section 1 require all surface mining activities be conducted to minimize disturbance to the hydrologic balance of the permit and adjacent areas and in no case shall any Federal or State water quality statutes, regulations, standards or effluent limitations be violated. Kentucky's proposed revisions are no less effective than the Federal counterparts.

At sections 5(6) and 5(7), the EPA recommends that Kentucky include criteria by which ponds will be removed and the affected stream reaches restored to original conditions. Kentucky proposed only minor revisions to these previously-approved regulations. It is no less effective than the Federal counterparts. The comment is, therefore, outside the scope of this rulemaking.

At sections 5(7) and 5(8), the EPA notes that a pond that is authorized pursuant to the Clean Water Act (CWA) Section 404 as a temporary structure is required by the conditions of those permits to be removed. If a pond is later proposed to be left as a permanent impoundment, CWA authorization will be required. We acknowledge the comment.

5. OSM's Decision

Based on the above findings, we approve the proposed amendment, with the exception of subsection 1(9)(c), as submitted by Kentucky on July 30, 1997, and revised on March 4, 1998, March 16, 1998, and July 14, 1998. As discussed in finding 2, we are removing the required amendment at 30 CFR 917.16(d)(4) because Kentucky has satisfied the requirement.

To implement this decision, we are amending the Federal regulations at 30 CFR part 917, which codify decisions concerning the Kentucky program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that Kentucky's program demonstrates that it has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

Effect of OSM's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved State program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In the oversight of the Kentucky program, we will recognize only the statutes, regulations, and other materials we have approved, together with any consistent implementing policies, directives, and other materials. We will require Kentucky to enforce only approved provisions.

6. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian lands.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute

major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 12, 2003.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR part 917 is amended as set forth below:

PART 917—KENTUCKY

■ 1. The authority citation for part 917 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 917.12 is amended by adding paragraph (e) to read as follows:

§ 917.12 State regulatory program and proposed program amendment provisions not approved.

* * * * *

(e) The exemption from the engineer inspection requirements of subsection 9 for an impoundment with no embankment structure, that is completely incised, or is created by a depression left by backfilling and grading, that is not a sedimentation pond or coal mine waste impoundment and is not otherwise intended to facilitate active mining at section 1(9)(c) at 405 KAR 16/18:100 is not approved. The exemption from examination for an impoundment with no embankment structure, that is completely incised or created by a depression left by backfilling and grading but not meeting MSHA requirements at 30 CFR 77.216 or not meeting the Class B and C classifications at section 1(10)(b) is not approved to the extent that it is not implemented and managed in accordance with the provisions of OSM Directive TSR–2.

■ 3. Section 917.15 is amended in the table in paragraph (a) by adding a new entry in chronological order by ''DATE OF PUBLICATION IN THE **FEDERAL REGISTER**'' to read as follows:

§ 917.15 Approval of Kentucky regulatory program amendments.

(a) * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
July 30, 1997	July 17, 2003	405 KAR 8:001 section 1(50); 16:001 section 1(50), (51), (69); 16:090 sections 1 through 5; 16:100 section 1(1),(3),(5),(6),(10), section 2(1); 16:160 section 1(1),(2),(3), section 2(2), section 3(1),(3), section 4; 18:001 section 1(52), (53), (72); 18:090 sections 1 through 5; 18:100 section 1(1),(3),(5),(6),(10), section 2(1); and 18:160 section 1(1),(2),(3), section 2(2), section 3(1),(3) and section (4).

* * * * *

■ 4. Section 917.16 is amended by removing and reserving paragraph (d)(4).

[FR Doc. 03–17968 Filed 7–16–03; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY–236–FOR]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; withdrawal of required amendment.

SUMMARY: We are withdrawing a required amendment to the Kentucky regulatory program (the ''Kentucky program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The required amendment pertains to public notification of permit applications. In doing so, we find that the Kentucky

program is consistent with the corresponding Federal regulations.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Kentucky Field Office Director William J. Kovacic. Telephone: (859) 260–8402, Internet address: *wkovacic@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Kentucky Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Kentucky program on May 18, 1982. You can find background information on the Kentucky program, including the Secretary's findings, the disposition of comments, and conditions of approval in the May 18, 1982, **Federal Register** (47 FR 21426). You can also find later actions concerning Kentucky's program and program amendments at 30 CFR 917.12, 917.13, 917.15, 917.16, and 917.17.

II. Submission of the Required Amendment

On December 31, 1990, we published in the **Federal Register** (55 FR 53490) a requirement that Kentucky amend its program to require that public notice shall not be initiated until the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet) has determined that a permit application is administratively complete. Kentucky was required to respond by January 30, 1991, but by letter of February 1, 1991, requested an extension to February 28, 1991. We granted that extension by letter of February 22, 1991. On March 4, 1991, Kentucky responded by letter indicating that the existing regulation at 405 Kentucky Administrative Regulations (KAR) 8:010 is as effective as the Federal regulations. Kentucky's response reminded OSM that the initial program approval of May 18, 1982, considered these public notice differences and deemed them to be no less effective than the Federal regulations. No action was taken on the letter. We announced our intent to reconsider this required amendment when we published a proposed rule notice in the June 6, 2002, **Federal Register** (67 FR 38917), and in the same document we invited public comment on the proposed action during a public comment period that closed on July 5, 2002.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17.

Our order that Kentucky amend its program was based on a regulation change made by us in 1983 that added the concept of an ''administratively complete application'' that starts the public notification process at 30 CFR 773.13(a)(1), later renumbered 30 CFR 773.6(a). As discussed below, the applicant could not begin the public notification process until the regulatory authority notified the applicant that the permit application was administratively complete. Our concern with the Kentucky program at the time, was that it appeared that if the permit application was determined *not* to be administratively complete after the notification process began, Kentucky did not have a provision that restarted the notification process once the permit application was determined to be administratively complete by Kentucky.

Kentucky's initial response to our order to amend its program stated that we had approved the provision, later found to be deficient in 1990, in 1982. However, the issue considered in the initial program approval in 1982 was different than the issue addressed in the required amendment since the required amendment was the result of a change in the Federal regulations in 1983.

The issue considered in the May 18, 1982, conditional approval is discussed in Finding 14.15 (47 FR 21415). That finding relates directly to an earlier finding, 14.27, regarding the review of Kentucky's initial program submittal published on October 22, 1980 (45 FR 69956). Finding 14.27 reads as follows: 405 KAR 8:010E Section 8(8) is less stringent than 30 CFR 786.11(d) concerning public notice of filing permit applications. The State regulation does not specify when the applicant must file a copy of the application in a local public office for public inspection; while the Federal regulation requires the filing by the first newspaper publication date. The newspaper publication would be meaningless if the application were not on file and available for public review at the same time.

As this finding indicates, the primary issue was when a copy of the submitted permit application would be made available for public review. When we conditionally approved the Kentucky program on May 18, 1982, we stated in finding 14.15 that Kentucky's explanation of its process persuaded us that Kentucky's program was no less effective than the Federal regulations.

The 1990 required amendment, on the other hand, resulted from a change in the Federal regulations that was made on September 28, 1983, when the concept of ''administratively complete application'' was added to the Federal definitions at 30 CFR 701.5 and applied at 30 CFR 773.13(a)(1) and later renumbered to the current 30 CFR 773.6(a), which provides for public notification of an administratively complete permit application.

Although Section 513(a) of SMCRA requires ''At the time of submission such advertisement shall be placed by the applicant in a local newspaper of general circulation in the locality of the proposed surface mine at least once a week for four consecutive weeks'', we believed that to achieve consistency among the various State and Federal regulatory programs the initial regulations adopted to implement this provision needed to be revised. The revision of the definition of a ''complete permit application'' to an ''administratively complete application'' was discussed in the 1983 preamble. There, we stated that:

> Under previous 30 CFR 786.11(a), applicants were required to place newspaper advertisements upon the filing of complete permit applications. In practice, however, the previous rule was not strictly applied and the comment period was not started anew each time additional information was submitted to the regulatory authority following the filing of an application. The final definition of an ''administratively complete application'' recognizes these practical realities, while ensuring that each regulatory requirement is addressed in sufficient detail initially to provide meaningful regulatory authority and public review of the applications.''

[48 FR 44349, September 28, 1983]. Thus, the 1983 regulatory changes recognize that the public notification process does not restart every time a change is made to a permit application.

We believe the intent of notifying the public that a permit application has been submitted is to alert it to the right to comment on the application. The deadline for submitting those comments

is thirty days after publication of the fourth consecutive and final newspaper advertisement, as set forth at 30 CFR 773.6(b)(2).

Kentucky's law, at KRS Section 350.055(2) requires the applicant to publish a notice of intention to mine * * * at least once a week for four consecutive weeks beginning at the time of submission. This is consistent with SMCRA. The Kentucky regulations at 405 KAR 8:010 Section 8 (2)(a) state that ''* * * [t]he first advertisement shall be published on or after the date the application is submitted to the Cabinet. The applicant may elect to begin notification on or after the date the applicant receives the notification from the Cabinet under Section 13(2) of this regulation that the application has been deemed administratively complete and ready for technical review * * * the final consecutive weekly advertisement being published after the applicant's receipt of written notice from the Cabinet that the application has been deemed administratively complete and ready for technical review * * *''

These Kentucky requirements were approved by us *prior* to our revisions promulgated in 1983 to require an ''administratively complete application'' determination before beginning public notification. Although Kentucky's program does not require the applicant to begin public notification until after the determination of administrative completeness, it does require the last notice to be after the determination of administrative completeness. Moreover, the Kentucky program does not explicitly address the question of whether the four consecutive weekly advertisements must be repeated if the application is determined to be administratively incomplete.

As noted above, Kentucky's regulations at 405 KAR Section 8(2)(a) state in part that ''* * * the advertisement shall be published at least once each week for four (4) consecutive weeks, with the final consecutive weekly advertisement being published after the applicant's receipt of written notice from the Cabinet that the application is deemed complete.'' This requires public advertisements to be published on ''consecutive'' weeks and that the final advertisement may only appear ''after'' the notification that the application is administratively complete. If an applicant chooses to begin publication before the administrative completeness determination, and Kentucky notifies the applicant that additional information is required before administrative completeness can be determined and the applicant stops advertising, it is quite likely that a ''break'' in the newspaper notices would occur and the ''consecutive'' advertisement requirement would not be complied with by the applicant. When this occurs, the applicant must restart the newspaper advertisements to comply with the ''consecutive'' requirement of the Kentucky program. In such instances, the current program, without modification, compels the applicant to begin the advertisement process anew. While there may be instances when no ''break'' in the advertisement sequence would occur, the Kentucky program does not prohibit the Cabinet from requiring the applicant to begin the advertisement sequence again after the administrative completeness determination is made. For this reason, and as discussed below, we believe the current program can be implemented in a manner that renders it no less effective than the Federal regulations.

After reviewing the Federal requirements and Kentucky's requirements we have decided to withdraw the required amendment as set forth at 30 CFR 917.16 (d)(2). This action is based on the understanding that Kentucky's implementation of the public participation requirements for permit application processing will require that, if a permit application is found not to be administratively complete, the four consecutive weeks advertisement sequence must start anew after the application is determined to be administratively complete. If in the future, we determine that the Kentucky program is not being implemented according to this decision, we may require Kentucky to amend its program.

IV. Summary and Disposition of Comments

No public or Federal agency comments were received on this proposed action during the public comment period.

V. OSM's Decision

Based on the above findings, we are removing the required amendment to Kentucky's program at 30 CFR 917.16(d)(2).

To implement this decision, we are amending the Federal regulations at 30 CFR part 917, which codify decisions concerning the Kentucky program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the Kentucky program demonstrate that Kentucky has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of Kentucky and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian Tribes.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 that requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons previously stated, this rule: (a) does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 917

Surface mining, Underground mining.

Dated: June 27, 2003.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR 917 is amended as set forth below:

PART 917—Kentucky

■ 1. The authority citation for part 917 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

§ 917.16 [AMENDED]

■ 2. Section 917.16 is amended by removing and reserving paragraph (d)(2).

[FR Doc. 03–18100 Filed 7–16–03; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 920

[MD–048–FOR]

Maryland Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving a proposed amendment to the Maryland regulatory program (the ''Maryland program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Maryland proposed revisions to and additions of rules about descriptions of proposed mining operations, impoundments, and inspection and certification of impoundments.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: George Rieger, Telephone: 412–937–2153. Internet: *grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Maryland Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Maryland program on December 1, 1980. You can find background information on the

Maryland program, including the Secretary's findings, the disposition of comments, and conditions of approval in the December 1, 1980, **Federal Register** (47 FR 79431). You can also find later actions concerning Maryland's program and program amendments at 30 CFR 920.12, 920.15 and 920.16.

II. Submission of the Proposed Amendment

By letter dated November 25, 2002, Maryland sent us an amendment to its program (Administrative Record No. MD–577–21) under SMCRA (30 U.S.C. 1201 *et seq.*) in response to the issuance of an OSM 732 letter dated July 8, 1997. Specifically, Maryland was required to amend several sections of the Code of Maryland Regulations (COMAR) including sections 26.20.02.13, 26.20.21.01, 26.20.21.08, and 26.20.21.09, relative to: Detailed design plans, siltation structures, and impoundments and the reference to the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) Technical Release No. 60 (criteria for dam classification).

We announced receipt of the proposed amendment in the March 25, 2003, **Federal Register** (68 FR 14360). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on April 24, 2003. We did not receive any public comments.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes. The full text of the changes can be found in the March 25, 2003, **Federal Register** (68 FR 14360).

Maryland proposed revisions to the following sections of COMAR in order to be consistent with the corresponding Federal regulations. Because these proposed rules contain language that is the same or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations.

COMAR 26.20.02.13

Maryland proposed to amend its regulations at Subsection U of COMAR 26.20.02.13 so that each application includes a ''general plan for each proposed siltation structure, sedimentation pond, water impoundment, and coal processing waste bank, dam, or embankment within the proposed mine plan area.'' The Federal regulations at 30 CFR 780.25(a) and 784.16(a) require that each application include ''a general plan and a detailed design plan for each proposed siltation structure, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.''

Although subsection U of the State regulation does not refer to ''a detailed design plan'' as does the Federal regulation, a detailed design plan is required by the State under subsection V. Maryland proposed to amend Subsection V(1) so that, like the Federal regulations, it requires a detailed design plan for ''each proposed siltation structure, sedimentation pond, water impoundment, and coal processing waste bank, dam, or embankment within the proposed mine plan area.''

Maryland also proposed to add a new subsection V(1)(a) that requires the design plan to be designed in compliance with COMAR 26.20.21.06 and .08, which provide performance standards for siltation structures and impoundments, respectively.

The deletion of the phrase, ''excess spoil disposal structure'' in the current subsection, and the replacement of this phrase with, ''siltation structure'' before the term ''sedimentation pond'' in the new subsection, make Maryland's rules substantively identical to the Federal rules at 30 CFR 780.25 and 784.16 which require siltation structures and sedimentation ponds to be designed in compliance with performance standards. The deletion of the reference to excess spoil does not render the Maryland program less effective because Maryland has permitting and performance standards for excess spoil at COMAR 26.20.02.13 AA and 26.20.26.01 respectively. Also the current subsection, (a)–(d) becomes subsections (b)–(e). The renumbering of the sections is purely administrative in nature.

We are approving these revisions, as they are no less effective than the Federal regulations.

Maryland also proposes revisions to subsection (3). The current subsection reads:

''(3) If a sedimentation pond, water impoundment, or coal processing waste dam or embankment is 20 feet or higher or impounds more than 20 acre-feet, the plan shall contain a stability analysis of each structure. The stability analysis shall include but not be limited to strength parameters, pore pressures, and long-term seepage conditions.

The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.''

Maryland is substituting the following: ''or embankment is 20 feet or higher or impounds more than 20 acre-feet'' with ''or siltation structure that meets the Class (b) or (c) criteria for dams in the USDA, Soil Conservation Service Technical Release No. 60, (October 1985), as incorporated by reference in COMAR 26.20.21.01–1 or meets the size or other criteria of 30 CFR 77.216(a).'' The deleted language is not a requirement of the Federal regulations.

This subsection is substantively identical to 30 CFR 780.25(f) and 784.16(f).

We find these revisions to be no less effective than Federal regulations and are approving the revisions.

Maryland proposes revisions to subsection AA(1). Subsection AA requires descriptions of excess spoil disposal sites. Subsection AA(1) currently reads:

''Descriptions, including appropriate maps and cross-section drawings, of any proposed excess spoil disposal site and design of the spoil disposal structures. These plans shall describe the geotechnical investigation, design, construction, operation, maintenance, and removal, if appropriate, of the site and structures.''

Revision of the first paragraph of subsection AA(1) reads: ''Each application shall contain descriptions including appropriate maps and cross-section drawings, of any proposed excess spoil disposal site and design of the spoil structures in accordance with COMAR section 26.20.26.''

We are approving this revision because it is substantively identical to 30 CFR 780.35(a). The reference to section 26.20.26, makes Maryland's program no less effective than 30 CFR 780.14(c) and 784.23(c) by clarifying that only registered professional engineers may certify designs for excess spoil fills. This is in accordance with item #3 of OSM's July 8, 1997, issue letter.

COMAR 26.20.21

Maryland proposes a new COMAR subsection 26.20.21.01–1:01–1 which reads, ''Incorporation by Reference, The U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210–VI–TR60, October 1985), ''Earth Dams and Reservoirs,'' Technical

Release No. 60 (TR–60) is incorporated by reference.''

We are approving this revision as the incorporation of the reference to the TR–60 makes Maryland's program no less effective than Federal regulations incorporation by reference to the same TR–60, at 30 CFR 780.25(a)(2) and 784.16(a)(2).

COMAR 26.20.21.08

Maryland proposes several revisions to COMAR subsection 26.20.21.08. First, Maryland proposes to revise subsection 26.20.21.08A, which lists the general requirements for impoundments. Under the current regulations, the first requirement is that impoundments be designed and constructed to ensure:

(1) Compliance with USDA, Soil Conservation Service, Standards and Specifications for Ponds (Code 378), July, 1981, as incorporated by reference in COMAR subsection 26.17.05.05B(3), if impoundments do not meet the size or other criteria of 30 CFR Section 77.216(a) and are located where failure would not be expected to cause loss of life or serious property damage.

The revised COMAR section 26.20.21.08A(1) reads as follows: ''(1) Compliance with USDA, Natural Resources Conservation Service, Maryland Conservation Practice, Standard Pond 378 (January 2000), as incorporated by reference in COMAR 26.17.02.01–1B(2).''

We are approving this revision because Code 378 addresses Class A Hazards. There is no direct Federal counterpart and we find it is not inconsistent with the Federal regulations at 30 CFR 816.49 and 817.49.

Maryland also proposes to revise the second requirement of subsection A. The new requirement reads as follows: ''(2) Compliance with requirements of COMAR 26.17.04.05 if the embankment is more than 15 feet in height as measured from the upstream toe of the embankment to the crest of the emergency spillway.''

We are approving this revision to the Maryland program as it is not inconsistent with the Federal regulations. Maryland also proposes a new subsection (3) referencing:

''Impoundments meeting the Class (b) or (c) criteria for dams in Earth Dams and Reservoirs, TR–60 shall comply with ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60 and the requirements of this regulation.''

We are approving this revision as it is substantively identical to and no less effective than the Federal counterpart under 30 CFR 816.49(a)(1) and 817.49(a)(1).

Maryland also proposes changes to subsection B of COMAR 26.20.21.08, which addresses the stability of impoundments. COMAR section 26.20.21.08B(1) currently requires that: ''(1) Impoundments meeting the size or other criteria of 30 CFR 77.216(a), located where failure would be expected to cause loss of life or serious property damage, or a coal mine waste impounding structure, shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions and a seismic safety factor of at least 1.2.''

The language addition states: ''(1) Impoundments meeting the Class (b) or (c) criteria for dams contained in ''Earth Dams and Reservoirs'', TR–60 or the size or other criteria of 30 CFR 77.216(a) shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions and a seismic safety factor of at least 1.2.''

The deleted language does not render the Maryland program inconsistent with the Federal regulations because loss of life or serious property damage is a hazard criterion for Class C impoundments. Additionally, the deletion of the phrase ''coal mine waste impounding structure'' is not inconsistent with Federal regulations because Maryland has performance standards for coal mine waste impounding structures at COMAR 26.20.27.11. We are approving this revision to the Maryland program as it is substantively identical to the Federal regulations at 30 CFR 816.49(a)(4)(i) and 817.49(a)(4)(i). The revision is therefore no less effective than the Federal counterpart regulations.

COMAR section 26.20.21.08B(2) currently requires that: ''(2) Except for coal mine waste impounding structures and impoundments located where failure would be expected to cause loss of life or serious property damage, impoundments not meeting the size or other criteria of 30 CFR 77.216(a) shall be constructed to achieve a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.''

Maryland proposes to make revisions to section 26.20.21.08B(2), which read:

''(2) Impoundments not included in Section B(1) of this regulation, except for coal mine waste impounding structures shall be constructed to achieve a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.''

The deleted language does not render the Maryland program inconsistent with the Federal regulations because loss of life or serious property damage is a criteria for Class C impoundments referenced in subsection B(1). We are approving these proposed revisions to the Maryland program, as they are substantively identical to and no less effective than Federal regulations at 30 CFR 816.49(a)(4)(ii) and 817.49(a)(4)(ii).

Maryland also proposes a new COMAR section 26.20.21.08.C, which reads:

''C. Freeboard. (1) Impoundments shall have adequate freeboard to resist overtopping by waves and sudden increases in storage volume. (2) Impoundments meeting the Class (b) or (c) criteria for dams in ''Earth Dams and Reservoirs'', TR–60 shall comply with the freeboard hydrograph criteria in ''Minimum Emergency Spillway Hydrologic Criteria'' table in TR–60. Subsequently, the current subsections C and D would therefore become subsections D and E, respectively.''

D. Foundation. The current subsection C(2) now reads: ''(2) For an impoundment meeting the size or other criteria of 30 CFR 77.216(a), foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

Subsection C(2) becomes D(2) and reads:

''(2) For an impoundment meeting the Class (b) or (c) criteria for dams contained in 'Earth Dams and Reservoirs', TR–60 or the size or other criteria of 30 CFR 77.216(a), foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.''

We are approving these proposed revisions to the Maryland program because they are substantively the same and no less effective than the Federal regulations at 30 CFR 816.49(a)(5)–(6) and 817.49(a)(5)–(6) regarding Freeboard and Foundation. Maryland is revising this section as a result of the July 8, 1997, issue letter requirements.

Maryland proposes changes to COMAR 26.20.21.08D. As noted above, the proposed addition of a new subsection C changes the current subsection D to E with approval of the proposed changes. Further, the State proposes changes to the current subsection D(3). Currently subsection D(3) contains subsections (a) and (b), which contain the required design precipitation event for impoundments meeting the spillway requirements of the section. The State proposes to add a new subsection D(3)(c): ''(c) For impoundments meeting the Class (b) or (c) criteria for dams in 'Earth Dams and

Reservoirs', TR–60, in accordance with the emergency spillway hydrograph criteria in the 'Minimum Emergency Spillway Hydrologic Criteria' table in TR–60, or larger event specified by the Department.''

Because a new subsection D(3)(c) is proposed, the State proposes to change subsection D(3)(b) by removing the period at the end of the sentence and adding a semicolon followed by the word ''or.'' With approval, the proposed changes, subsections E through I will change to F through J, respectively, but would otherwise remain unchanged.

We are approving these revisions to the Maryland program as they are no less effective than the counterpart Federal regulations at 30 CFR 816.49(a)(9)(ii)(A) and 817.49(a)(9)(ii)(A). The revisions make Maryland's language substantively the same as Federal language and are in response to the July 8, 1997, 732 issue letter requirements.

COMAR 26.20.21.09

Maryland proposes changes to COMAR 26.20.21.09D, which relates to the examination of impoundments. Subsection D(1) currently states: ''(1) Impoundments subject to 30 CFR 77.216 shall be examined in accordance with 30 CFR 77.21–3. Other impoundments shall be examined at least quarterly by a qualified person for appearance of structural weakness and other hazardous conditions.''

The new COMAR section 26.20.21.09D(1) reads: ''(1) Impoundments meeting the Class (b) or (c) criteria for dams in ''Earth Dams and Reservoirs'', TR–60 or the size or other criteria of 30 CFR 77.216 shall be examined in accordance with 30 CFR 77.216–3. Other impoundments not meeting the Class (b) or (c) criteria for dams in ''Earth Dams and Reservoirs'', TR–60 or subject to 30 CFR 77.216 shall be examined at least quarterly by a qualified person for appearance of structural weakness and other hazardous conditions.''

We are approving this revision to the Maryland program, as it is substantively identical to and no less effective than the counterpart Federal regulations at 30 CFR 816.49(a)(12) and 817.49(a)(12). Maryland is making these revisions to its program in order to be consistent with Federal regulations and as a result of OSM's July 8, 1997, 732 issue letter requirements.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record No. MD–577–25), but did not receive any.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Maryland program (Administrative Record No. MD–577–22). We received one comment. This comment from the USDA's NRCS, noted that the proposed changes were consistent with the NRCS's performance standards for impoundments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from EPA (Administrative Record No. MD–577–24). EPA did not respond to our request. Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). This amendment does not contain provisions that relate to air or water quality standards and, therefore, concurrence by the EPA is not required.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On December 10, 2002, we requested comments on Maryland's amendment through the Maryland Historical Trust (Administrative Record No. MD–577–22), but received no response to our request.

V. OSM's Decision

Based on the above findings, we approve the amendment Maryland sent us. We approve, as discussed in the findings above: COMAR 26.20.02.13 U, concerning the elimination of the phrase ''excess spoil disposal structure'' and the addition of the phrase ''siltation structure'; V(1)(a) an addition to the enumerated criteria and (3) concerning the added reference to the USDA NRCS (formerly the Soil Conservation Service) Technical Release No. 60 (TR–60) and the deletion of the phrase ''excess spoil disposal structure at V(1)'' and by deleting ''or embankment is 20 feet or higher or impounds more than 20 acre-feet'' at V(3); AA(1) referencing COMAR 26.20.26; a new COMAR subsection ''26.20.21.01–1'' concerning an incorporation by reference to (TR–60); 26.20.21.08 A(1) through (3) concerning an incorporation by reference to Maryland NRCS Conservation Practice, Standard Pond 378 (January 2000), and a new subsection referencing the (TR–60) ''Minimum Emergency Spillway Hydrologic Criteria Table'', B(1) and (2) referencing the (TR–60) ''Earth, Dams and Reservoirs'', a reference to subsection B(1) and non coal mine waste impoundments, and deleting the reference to 26.17.05.05B(3) at subsection A, and also deleting at subsection A and B, the phrase ''if impoundments do not meet the size or other criteria of 30 CFR 77.216(a) and are located where failure would not be expected to cause loss of life or serious property damage''; a new subsection C pertaining to ''Freeboard'', renumbering section D(2) and E(3) and 26.20.21.09D(1) regarding ''examinations of impoundments''.

We approve the rules proposed by Maryland with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR part 920, which codify decisions concerning the Maryland program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that Maryland's program demonstrate that it has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of Maryland and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by

section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal program involving Indian tribes.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 that requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 920

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 27, 2003.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR 920 is amended as set forth below:

PART 920—MARYLAND

■ 1. The authority citation for part 920 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 920.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 920.15 Approval of Maryland regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
November 25, 2002	July 17, 2003	COMAR 26.20.02.13 U, V(1) and (3), AA(1); 26.20.21.01–1; 26.20.21.08 A(1) through (3), B(1) and (2), C, D(2), E(3); 26.20.21.09D(1).

[FR Doc. 03–18101 Filed 7–16–03; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100, 117, and 165

[CGD09–03–208]

RIN 1625–AA08
RIN 1625–AA09
RIN 1625–AA00

Toledo Tall Ships Parade, July 16, 2003, Port of Toledo, OH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations, including an exclusionary area and spectator anchorage areas, a regulated navigation area, as well as drawbridge regulations for the Parade of Sail Toledo 2003 in the Port of Toledo, Ohio, on July 16, 2003. These regulations are necessary to promote the safe navigation of vessels and the safety of life and property during the heavy volume of vessel traffic expected during this event. These regulations are intended to restrict vessel traffic from a portion of Lake Erie and the Maumee River.

DATES: This rule is effective from 9 a.m. on July 16, 2003 through 5 p.m. on July 20, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD09–03–208 and are available for inspection of copying at U.S. Coast Guard Marine Safety Office (MSO) Toledo, 420 Madison Ave, Suite 700, Toledo, Ohio 43604 between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: LT Herb Oertli, Chief of Port Operations, MSO Toledo, at (419) 418–6050.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On May 20, 2003, we published a notice of proposed rule making (NPRM) entitled Toledo Tall Ships Parade 2003, Port of Toledo, OH in the **Federal Register** (68 FR 27498). We did not receive any letters commenting on the proposed rule. No public hearing was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Delaying the effective date of this rule would be contrary to the public interest of ensuring the safety of spectators and vessels during this event and immediate action is necessary to prevent possible loss of life or property. The Coast Guard has not received any complaints or negative comments with regard to this event.

Background and Purpose

These temporary special local regulations are for the Toledo 2003 Tall Ships Parade of Sail that will be held in the Maumee River from 9 a.m. through 7 p.m. on July 16, 2003. These regulations will assist in providing for the safety of life on navigable waters and to protect commercial vessels, tall ships, spectators, and the Port of Toledo during this event.

American Sail Training Association is sponsoring Sail Toledo 2003. The scheduled events will occur July 16, 2003 in the Port of Toledo and surrounding waters. This event will consist of a Parade of Sail from the mouth of the Maumee River to Independence Park. The parade route will originate in Maumee Bay and continue inbound up the Maumee Bay and Maumee River channel to various berths throughout the Port of Toledo.

The Coast Guard expects several hundred spectator crafts to attend the parade of sail and tall ship celebration. The regulations will create temporary anchorage regulations and vessel movement controls through the regulated area. The regulations will be in effect from 9 a.m. through 7 p.m. on July 16, 2003. Vessel congestion, due to the anticipated large number of participating and spectator vessels, introduces extra or unusual hazards during this event pose a significant threat to the safety of life. This rulemaking is necessary to ensure the safety of life on the navigable waters of the United States.

The Coast Guard is establishing regulated areas in the Maumee River that will be in effect during the Toledo Parade of Sail 2003 event. These regulated areas are needed to permit unrestricted law enforcement vessel access to support facilities. Additionally, the regulated areas will protect the maritime public and participating vessels from possible hazards to navigation associated with the dense vessel traffic.

The regulated area will cover all portions of the Maumee River upriver of a line drawn between north-east corner of Grassy Island at 41°42′24″ N, 083°26′48″ W and the south-west corner of Spoil area at 41°42′17″ N, 083°26′38″ W to the downriver side of the Anthony Wayne Bridge. All coordinates are based upon North American Datum 1983 (NAD 83). This temporary regulated area would be in effect from 9 a.m. through 7 p.m. on July 16, 2003.

On July 16, 2003, following the Parade of Sail, restrictions on vessels on the Maumee River will reopen in sequence with the movement and mooring of the final flotilla of tall ships. After the final flotilla of tall ships have passed the Martin Luther King, Jr. Bridge, vessel operators anchored in spectator anchorages north of the Martin Luther King Bridge may depart for locations outside of the Maumee River. After the final flotilla of tall ships has safely moored, vessel operators may transit the Maumee River. Vessels transiting the Maumee River must proceed as directed by on-scene Coast Guard personnel.

The Coast Guard is establishing spectator anchorage areas for spectator craft. All other vessels except those viewing the Parade of Sail Toledo 2003 are restricted from using these spectator anchorages. These spectator anchorage areas will be in effect on July 16, 2003.

To ensure the safety of the participating vessels during the parade, there will be two prolonged bridge openings on July 16, 2003. The CSX railroad bridge at mile 1.07, the Norfolk & Southern railroad bridge at 1.80, the Craig Memorial bridge at mile 3.30, and the Martin Luther King Memorial (a.k.a. Cherry Street) bridge at mile 4.30 will remain open from 12 p.m. until 1:30 p.m. and then from 2 p.m. until 3:30 p.m. Having two prolonged openings

will accommodate participating vessels while at the same time allowing for both vehicular and pedestrian traffic the opportunity to cross the bridges during the parade.

Discussion of Comments and Changes

No comments were received and no changes were made to this rule.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Homeland Security.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

While this rule imposes traffic restrictions in portions of the Maumee River during the events, the effect of this regulation will not be significant for the following reasons: The regulated areas, spectator anchorages, will be limited in duration; and extensive advance notice will be made to the maritime community via Local Notice to Mariners, facsimile, marine safety information broadcasts, local Port Operators Group meetings, the Internet, and Toledo area newspapers and media. The advance notice will permit mariners to adjust their plans accordingly. Additionally, these regulated areas are tailored to impose the least impact on maritime interests without compromising safety.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), an initial review was conducted to determine whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

For the reasons stated in the Regulatory Evaluation section above, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in portions of Maumee River during various times on July 16, 2003. These regulations will not have a significant economic impact on a substantial number of small entities because the Coast Guard will notify the public via mailings, facsimiles, Local Notice to Mariners, marine safety information broadcasts, local Port Operators Group meetings, the media, the Internet, and Toledo area newspapers. In addition, the sponsoring organization, Huntington Toledo Tall Ships 2003, plans to announce event information in local newspapers, pamphlets, and television and radio broadcasts. This advance notice will permit mariners to adjust their plans accordingly. Although these regulations will apply to a substantial portion of the Port of Toledo, areas for viewing the Parade of Sail, are being established to maximize the use of the waterways by commercial vessels that usually operate in the affected areas.

If you think that your businesses, organization, or governmental jurisdiction qualifies as a small entity and believe that this rule would significantly impact them may submit a comment (see **ADDRESSES**) explaining why they think they qualify and how and to what degree this rule would economically affect them.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), the Coast Guard aims to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If this rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Herb Oertli, MSO Toledo, at (419) 418–6040.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it

does not require a Statement of Energy Effects under Executive Order 13211.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under figure 2–1, paragraphs 34 (f, g, and h) of Commandant Instruction M16475.1C, this proposed rule is categorically excluded from further environmental documentation. A written ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES.**

List of Subjects

33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

33 CFR Part 117

Bridges.

33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100, 117, and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233 through 1236; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 100.T09–208 to read as follows:

§ 100.TO9–208 Regulated area, Toledo Tall Ships Parade 2003, Port of Toledo, OH.

(a) *Definitions*—(1) *Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer who has been designated by the Commander, U.S. Coast Guard Group Detroit.

(2) *Regulated Area.* All waters of the Maumee River between a line drawn between north-east corner of Grassy Island at 41°42′24″ N, 083°26′48″ W and the south-west corner of Spoil area at 41°42′17″ N, 083°26′38″ W; to the downriver side of the Anthony Wayne Bridge at mile 4.30 (NAD 83).

Note to paragraph (a)(2) of this section: Mariners are cautioned that these areas being established as spectator areas have not been subject to any special survey or inspection and that charts may not show all obstructions or the shallowest depths. In addition, substantial currents may exist in these spectator areas and not all portions of these areas are over good holding ground. Mariners are advised to take appropriate precautions when using these spectator areas.

(3) *Spectator Vessel Anchorage Areas.*

(i) *Area A.* All waters of Maumee River south of Grassy Island, bounded by the following: Beginning at 41°41.56′ N, 083°28.35′. W; then south-east to 41°41.52′ N, 083°28.29′ W; then south-west to 41°41.18′ N, 083°28.73′ W; then north-west to 41°41.23′ N, 083°28.8′ W; then back to the beginning (NAD 83).

(ii) *Area B.* All waters of Maumee River bounded by the following: Beginning at 41°41.06′ N, 083°29.04′ W; then south-east to 41°41.01′ N, 083°28.96′ W; then south-west to 41°40.61′ N, 083°29.38′ W; then north-west to 41°40.661′ N, 083° 29.45′ W; then back to the beginning (NAD 83).

(iii) *Area C.* All waters of the Maumee River bounded by the following: Beginning at 41°40.48′ N, 083°29.66′ W; then south-east to 41°40.43′ N, 083°29.56′ W; then south-west to 41°40.18′ N, 083°29.89′ W; then north-west to 41°40.24′ N, 083°29.98′ W; then back to the beginning (NAD 83).

(iv) *Area D.* All waters of the Maumee River bounded by the following: Beginning at 41°39.22′ N, 083°31.51′ W; then south-east to 41°39.16′ N, 083°31.45′ W; then south-west to 41°39.09′ N, 083°31.58′ W then north-west to 41°39.14′ N, 083°31.63′ W; then back to the of beginning (NAD 83).

(b) *Special Local Regulations.* (1) Except for vessels officially participating in the Toledo Tall Ships Parade 2003, or those vessels in designated spectator areas, no person or vessel may enter or remain in the regulated area without the permission of the Coast Guard Patrol Commander.

(2) Vessels in any spectator area shall proceed at no wake speeds not to exceed five miles per hour, unless otherwise authorized by the Captain of the Port.

(3) Vessel operators shall comply with the instructions of on-scene Coast Guard patrol personnel.

(4) After completion of the Parade of Sail on July 16, 2003, vessel operators within the Regulated Area are prohibited from passing outbound patrol vessels showing blue lights.

(5) Anchorage Area D, in paragraph (a)(3)(iv) of this section, is restricted for the use of those vessels officially participating in Parade of Sail Toledo 2003 activities. No other vessels will be permitted in Spectator Area D without permission of the Captain of the Port.

(6) Vessels, except emergency, law enforcement, and those authorized by the Captain of the Port, may not transit through the Regulated Area.

(7) Vessels must vacate all spectator areas after the termination of the effective period for this regulation.

(8) Vessels must mark with an identifiable buoy any anchors, which have been fouled on obstructions if such anchors cannot be freed or raised.

(9) Vessels that would like to view the tall ship events occurring in Maumee Bay prior to the tall ships entering the Maumee River must use Spectator Area A.

(10) Vessels are not to be left unattended in any spectator area at any time.

(11) Vessels are prohibited from securing to or tying off to any buoy or any other vessel within any spectator area.

(12) Vessels should maintain at least twenty (20) feet of clearance if maneuvering between anchored vessels.

(13) Vessels are prohibited from blocking access to any designated emergency medical evacuation areas.

(c) *Effective period.* This rule is effective from 9 a.m. July 16, 2003 until 5 p.m. on July 20. This section will be enforced from 9 a.m. until 7 p.m. on July 16, 2003.

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 3. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Section 117.255 also issued under authority of Pub. L. 102–587, 106 Stat. 5039; Department of Homeland Security Delegation No. 0170.1.

■ 4. From 12 p.m. until 3:30 p.m., Wednesday, July 16, 2003, suspend § 117.855, and add temporary § 117.856 to read as follows:

§ 117.856 Maumee River.

(a) The draws of the CSX Transportation railroad bridge, mile 1.07, Norfolk Southern railroad bridge, mile 1.80, Craig Memorial highway bridge, mile 3.30, and the Martin Luther King Memorial Bridge (a.k.a. Cherry Street highway Bridge), mile 4.30, will open from 12 p.m. until 1:30 p.m. and then again from 2 p.m. until 3:30 p.m.

(b) The draw of the Norfolk Southern railroad bridge, mile 5.76, shall open on signal.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 5. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 6. Add temporary § 165.T09–208 to read as follows:

§ 165.T09–208 Regulated Navigation Area; Toledo Tall Ships 2003, Toledo, Ohio.

(a) *Regulated navigation area.* (1) *Location.* All waters of Maumee River between the downriver side of the Anthony Wayne Memorial Bridge (mile 5.16) and the upriver side of the Martin Luther King Jr. Bridge (a.k.a Cherry Street Bridge)(mile 4.3).

(2) *Enforcement period.* This rule is effective from 9 a.m. on July 16, 2003 until 5 p.m. on July 20, 2003. This section will be enforced from 5 p.m. on July 16, 2003 until 5 p.m. on July 20, 2003.

(b) *Special regulations.* Vessels within the RNA shall not exceed 5 miles per hour or shall proceed at no-wake speed, which ever is slower. Vessels within the RNA shall not pass within 20 feet of a moored tall ship. Vessels within the RNA must adhere to the direction of the Patrol Commander or other official patrol craft.

Dated: July 7, 2003.

Ronald F. Silva,

Rear Admiral, Coast Guard Commander, Ninth Coast Guard District.

[FR Doc. 03–17985 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 110 and 165

[CGD09–03–207]

RIN 1625–AA01

RIN 1625–AA00

Tall Ships 2003, Navy Pier, Chicago, IL, July 30–August 4, 2003

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary regulated navigation area (RNA), a moving safety zone and temporarily suspending two anchorage areas encompassed by the RNA for the 2003 Tall Ships Challenge. These regulations are necessary to control vessel traffic in the immediate vicinity for the protection of both participant and spectator vessels during the 2003 Tall Ships Challenge and Parade of Ships. These regulations are intended to restrict vessel traffic in a portion of Lake Michigan in the vicinity of Chicago Harbor for the duration of the event.

DATES: This rule is effective from 10 a.m. on July 30, 2003 through 5 p.m. August 3, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD09–03–207 and are available for inspection or copying at U.S. Coast Guard Marine Safety Office Chicago, 215 W. 83rd Street, Suite D, Burr Ridge, IL 60527, between 8 a.m. and 4 p.m. Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: MST2 Kenneth Brockhouse, MSO Chicago, at (630) 986–2155.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On May 20, 2003, we published a notice of proposed rule making (NPRM) entitled Tall Ships 2003, Navy Pier, Lake Michigan, Chicago, IL in the **Federal Register** (68 FR 27501). We did not receive any letters commenting on the proposed rule. No public hearing was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Delaying the effective date of this rule would be contrary to the public interest of ensuring the safety of spectators and vessels during this event and immediate action is necessary to prevent possible loss of life or property. The Coast Guard has not received any complaints or negative comments with regard to this event.

Background and Purpose

During the Chicago Tall Ships event, tall ships will be participating in a Tall Ships Parade and then mooring in Chicago harbor and in the Chicago River. A Regulated navigation area (RNA) will be established that encompasses portions of both the Chicago Harbor as well as the Chicago River to protect those boarding the tall ships as well as spectator vessels from vessels transiting at excessive speeds creating large wakes, and also to prevent obstructed waterways. The RNA will be established on July 30, 2003 and terminate on August 3, 2003 after all the tall ships have departed the area.

A moving safety zone will be established around those vessels officially participating in the Tall Ships Parade of Ships. The Parade of Ships is the start of the Tall Ships 2003 in Chicago, Illinois and a large number of spectator vessels are expected. The parade will include approximately 20 to 30 tall ships and will take place starting on the morning of July 30, 2003 until the evening of July 30, 2003.

Discussion of Comments and Changes

No comments were received and no changes were made to this rule.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 on Regulatory Planning and Review and therefore does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed this rule under that Order. It is non-significant under Department of Homeland Security regulatory policies and procedures. We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DHS is unnecessary. This finding is based on the minimal time that vessels will be restricted from the zone.

Small Entities

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612) has determined that this rule will not have a significant impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this final rule would not have a significant economic impact on a substantial number of small entities. This final rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of an activated safety zone. The safety zone and suspended anchorage area would not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic can safely pass outside the proposed safety zone during the event. Traffic would be allowed to pass through the safety zone only with the permission of the Captain of the Port or his on scene representative which will be the Patrol Commander. In addition, before the effective period, the Coast Guard would issue maritime advisories widely available to users who might be in the affected area.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see*

ADDRESSES) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), the Coast Guard wants to assist small entities in understanding this rule so that they can better evaluate its effects and participate in the rulemaking process. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact MSO Chicago (*see* **ADDRESSES.**)

Collection of Information

This final rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a state, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those costs. This final rule would not impose an unfunded mandate.

Taking of Private Property

This final rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this final rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

The Coast Guard has considered the environmental impact of this final rule and concluded that, under figure 2–1, paragraph 32(g) of Commandant Instruction M16475.1C, this proposed rule is categorically excluded from further environmental documentation. A written categorical exclusion determination is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 110

Anchorage grounds.

33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 110 and 165 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1(g), and Department of Homeland Security No. 0170.

§ 110.205 [Suspended]

■ 2. From 10:30 a.m. (local time) on July 30, 2003 until 8 p.m. (local time) on August 3, 2003, § 110.205(a)(1) and (a)(2) are temporarily suspended.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 3. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 70: 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 4. Add § 165.T09–207 to read as follows:

§ 165.T09–207 Tall Ships 2003, Navy Pier, Lake Michigan, Chicago, IL.

(a) *Regulated navigation area.*

(1) *Location.* The following is a regulated navigation area: starting at the Southeast Guide Wall light at 41°53′17.76″ N, 87°36′09.110″ W; then south south-easterly to 41°52′48″ N, 087°36′08″ W; then east to the southern most end of the outer Chicago Harbor break wall at 41°52′48″ N, 087°35′26″ W; then north following the outer Chicago Harbor break wall to 41°54′11″ N, 087°36′29″ W; then southwest to the north-eastern tip of the Central District Filtration Plant; then to the southeastern tip of the Central Filtration Plant; then to the north-east corner of the Navy Pier; then following the shoreline and/or seawall, including up the Chicago River to the eastern side of the Michigan Avenue bridge, back to the point of origin (NAD 83).

(2) *Enforcement period.* This section is effective from 10 a.m. on Wednesday, July 30, 2003 through 5 p.m. on Sunday, August 3, 2003. The section will be enforced from 8 p.m. on Wednesday, July 30, 2003 until 5 p.m. on Sunday, August 3, 2003.

(3) *Special regulations.* Vessels within the RNA shall not exceed 5 miles per hour or shall proceed at no-wake speed, which ever is slower. Vessels within the RNA shall not pass within 20 feet of a moored tall ship. Vessels within the RNA must adhere to the direction of the Patrol Commander or other official patrol craft.

(b) *Safety zone.* (1) *Location.* The following is a moving safety zone: All navigable waters 100 yards ahead of the first official parade vessel, 50 yards abeam of each parade vessel, and 50 yards astern of the last vessel in the parade between the muster point at

42°03′24″ N, 087°38′20.4″ W until each official parade vessel is moored (NAD 83).

(2) *Enforcement period.* This rule is effective from 10 a.m. on Wednesday, July 30, 2003 through 5 p.m. on Sunday, August 3, 2003. This section will be enforced from 10 a.m. until 8 p.m., or until the last tall ship is moored, on Wednesday, July 30, 2003.

(c) *Regulations.* (1) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on scene patrol personnel. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard. Upon being hailed by a U.S. Coast Guard vessel via siren, radio, flashing light, or other means, the operator shall proceed as directed. U.S. Coast Guard Auxiliary, representatives of the event organizer, and local or state officials may be present to inform vessel operators of this regulation and other applicable laws.

(2) Most of the locations are outside of navigation channels and will not adversely affect shipping. In cases where shipping is affected, commercial vessels may request permission from the Captain of the Port, Chicago to transit the safety zone. Approval in such cases will be case-by-case. Requests must be made in advance and approved by the Captain of the Port or his designated on-scene representative. The Captain of the Port, Chicago or his designated on-scene representative may be contacted on Channel 16, VHF–FM.

Dated: July 7, 2003.

Ronald F. Silva,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 03–18117 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP San Francisco Bay 03–019]

RIN 1625–AA00

Safety Zone; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone within the navigable waters of the Sacramento River, Sacramento, CA, for a water festival that includes high-speed boat exhibitions, water safety demonstrations, and other water-skiing and wake-boarding demonstrations that will take place on the Sacramento River between the mouth of the American River and the entrance to the Miller Park Marina along the Sacramento waterfront. This safety zone is necessary to protect the racing boat operators, water safety demonstration participants, other event participants, spectators, and vessels and other property from the hazards associated with the water festival activities. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 9 a.m. (PDT) on July 19, 2003 through 5:30 p.m. (PDT) on July 20, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of the docket [COTP San Francisco Bay 03–019] and are available for inspection or copying at Coast Guard Marine Safety Office San Francisco Bay, Coast Guard Island, Alameda, California, 94501, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Doug L. Ebbers, U.S. Coast Guard Marine Safety Office San Francisco Bay, at (510) 437–3073.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Due to the complex coordination involved in planning the festival, major planning components of the Sacramento Bridge to Bridge Water Festival were only recently completed, and the logistical details surrounding the boat races and water safety demonstrations were not finalized and presented to the Coast Guard in time to draft and publish an NPRM. As such the event would occur before the rulemaking process was complete. Any delay in implementing this rule would be contrary to the public interest since immediate action is necessary to temporarily close the area in order to protect the maritime public from the hazards associated with these boat races, water-skiing demonstrations and aircraft demonstrations, which are intended for public entertainment.

For the same reasons stated above, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.**

Background and Purpose

The Sacramento Convention & Visitors Bureau is sponsoring the Sacramento Bridge to Bridge Water Festival on July 19 and 20, 2003, an event involving aircraft and boat water safety demonstrations, high-speed boat races, and other water-borne demonstrations of short duration. This safety zone is necessary to protect the spectators along with vessels and other property from the hazards associated with the event. This temporary safety zone will consist of the navigable waters of the Sacramento River between the Pioneer Bridge and the mouth of the American River. The Coast Guard has granted the Sacramento Convention & Visitors Bureau a marine event permit for this event.

Discussion of Rule

The following area will constitute a temporary safety zone: All navigable waters of the Sacramento River in an area four thousand yards by two hundred yards bounded by the following positions: 38°35′49.0″ N, 121°30′30.0″ W; thence to 38°35′49.0″ N, 121°30′23.0″ W; thence to 38°33′40.0″ N, 121°30′59.0″ W; thence to 38°33′46.0″ N, 121°31′11.0″ W; thence returning to the point of origin (NAD 83). Entry into, transit through or anchoring within the safety zone is prohibited, unless authorized by the Captain of the Port, or his designated representative.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Although this safety zone does restrict boating traffic within the Sacramento River, the effect of this regulation will not be significant as the safety zone will be short in duration.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit

organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. For the same reasons set forth in the above Regulatory Evaluation, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule is not expected to have a significant economic impact on any substantial number of entities, regardless of their size.

This safety zone will not have a significant impact on a substantial number of small entities because although the safety zone will occupy most of the width of the river at that point, the Patrol Commander of the event will open it up from approximately 12:15 p.m. to 12:45 p.m. on each of the two days to allow vessel traffic to pass through. In addition, most of the vessels in that area will be participating in the event, so the impact will be at a minimum.

Assistance For Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule contains no collection of information requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because we are establishing a safety zone.

An ''Environmental Analysis Checklist'' and a ''Categorical Exclusion Determination'' is available in the docket for inspection or copying where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reports and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.

■ 2. From 9 a.m. on July 19, 2003 through 5:30 p.m. on July 20, 2003 add § 165.T11–091 to read as follows:

§ 165.T11–091 Safety Zone: Sacramento River, Sacramento, CA.

(a) *Location.* The following area is designated as a safety zone: an area which is four thousand yards by two hundred yards and which will be bounded by the following positions: 38°35′49.0″ N, 121°30′30.0″ W; thence to 38°35′49.0″ N, 121°30′23.0″ W; thence to 38°33′40.0″ N, 121°30′59.0″ W; thence to 38°33′46.0″ N, 121°31′11.0″ W; thence returning to the point of origin (NAD 83).

(b) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transit through,

or anchoring within this zone by all vessels is prohibited, unless authorized by the Captain of the Port, or a designated representative thereof.

(2) Persons desiring to transit the area of the safety zone may contact the Patrol Commander on VHF–FM channel 83, or the Captain of the Port at telephone number 510–437–3073 or on VHF–FM channel 16 (156.8 Mhz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his designated representative.

(c) *Enforcement.* All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel comprise commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(d) *Effective period.* This section will be enforced from 9 a.m. to 5:30 p.m. (PDT) on July 19 and 20, 2003. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of the safety zone and will announce that fact via Broadcast Notice to Mariners.

Dated: July 9, 2003.

Steven J. Boyle,

Commander, U.S. Coast Guard, Acting Captain of the Port, San Francisco Bay, California.

[FR Doc. 03–17983 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD13–03–013]

RIN 1625–AA00 (Formerly RIN 2115–AA97)

Safety Zone; Fireworks Display, Columbia River, Astoria, OR

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the waters of the Columbia River in the vicinity of Astoria, Oregon. The Captain of the Port, Portland, Oregon, is taking this action to safeguard watercraft and their occupants from safety hazards associated with the fireworks display. Entry into this safety zone is prohibited unless authorized by the Captain of the Port.

DATES: This rule is effective July 17, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [CGD13–03–013] and are available for inspection or copying at USCG MSO/Group Portland 6767 N. Basin Ave, Portland, Oregon 97217 between 7 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Tad Drozdowski, Operations Department, at (503) 240–9370.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 6, 2003, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; Fireworks Display, Columbia River, Astoria, Oregon in the **Federal Register** (68 FR 109). We received no letters commenting on the proposed rule. No public hearing was requested, and none was held.

Background and Purpose

The Coast Guard is establishing a temporary safety zone to allow a safe fireworks display. This event may result in a number of vessels congregating near the fireworks launching barge. The safety zone is needed to protect watercraft and their occupants from safety hazards associated with the fireworks display.

Discussion of Comments and Changes

No comments were received from the public regarding this proposed rule.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). The Coast Guard expects the economic impact of this rule to be so minimal that a full regulatory evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the fact that the regulated area established by the regulation will encompass less than one mile of the Columbia River for a period of only one hour at night, annually, when vessel traffic is low.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Waiting 30 days for this rule to be effective is contrary to the public interest. Due to the complex planning and coordination of the event in 2003, the event sponsor was unable to provide the Coast Guard with notice of details of this year's event in time to allow for notice and comment and a 30-day waiting period prior to the effective date after publication. Since immediate action is necessary to ensure the safety of vessels and spectators gathered in the vicinity of the fireworks launching barge, it is in the public interest to make the rule effective less than 30 days after publication in the **Federal Register**.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit a portion of the Columbia River from 9:30 p.m. to 10:30 p.m. on the second Saturday in August, annually. This safety zone will not have significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for only one hour in the evening when vessel traffic is low. Traffic will be allowed to pass through the zone with the permission of the Captain of the Port or his designated representatives on scene, if safe to do so. Because the impacts of this rule are expected to be so minimal, the Coast Guard certifies under 5 U.S.C. 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601–612) that this final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offered to assist small entities

in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Request for comments and assistance was published in the notice of proposed rulemaking for this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1126, 1231; 46 U.S.C. chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Section 165.1316 is added to read as follows:

§ 165.1316 Safety Zone; Columbia River, Astoria, Oregon.

(a) *Location.* The following area is a safety zone: All waters of the Columbia River at Astoria, Oregon enclosed by the following points: North from the Oregon shoreline at 123°49′36″ West to 46°11′51″ North thence east to 123°48′53″ West thence south to the Oregon shoreline and finally westerly along the Oregon shoreline to the point of origin.

(b) *Regulations.* In accordance with the general regulations in § 165.23 of this part, no person or vessel may enter or remain in this zone unless authorized by the Captain or the Port or his designated representatives.

(c) *Authority.* In addition to 33 U.S.C. 1231, the authority for this section includes 33 U.S.C. 1226.

(d) *Enforcement period.* This section will normally be enforced on the second Saturday of August from 9:30 p.m. (PDT) to 10:30 p.m. (PDT). Announcement of enforcement periods may be made by the methods described in 33 CFR 165.7, or any other reasonable method.

Dated: July 8, 2003.

Paul D. Jewell,

Captain, U.S. Coast Guard, Captain of the Port.

[FR Doc. 03–18119 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[WT Docket No. 97–112, CC Docket No. 90–6; FCC 03–130]

Public Mobile Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission resolves petitions for

reconsideration filed against the *Report and Order* in WT Docket No. 97–112 and CC Docket No. 90–6, in which the Commission modified rules affecting cellular service in the Gulf of Mexico. The Commission reinstates certain co-location applications that were inadvertently dismissed pursuant to the *Gulf Report and Order*, and modifies § 22.912 of the Commission's rules to clarify that land-based cellular carriers are precluded from extending their service area boundaries into any part of the Gulf of Mexico Exclusive Zone without the applicable Gulf carrier's consent. The Commission also affirms that the market boundaries of Personal Communications Service (PCS) licensees adjacent to the Gulf of Mexico are co-extensive with county boundaries.

DATES: Effective September 15, 2003.

FOR FURTHER INFORMATION CONTACT: Roger Noel or Linda Chang, Wireless Telecommunications Bureau, at (202) 418–0620.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order on Reconsideration,* in WT Docket 97–112 and CC Docket No. 90–6, FCC 03–130, adopted June 10, 2003, and released June 27, 2003. The full text of the *Order on Reconsideration* is available for public inspection during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor: Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail at *qualexint@aol.com.*

Synopsis of *Order on Reconsideration*

I. Background

1. In January 2002, the Commission released a *Report and Order* in WT Docket No. 97–112 and CC Docket 90–6 (*Gulf Report and Order*), in which it established a comprehensive regulatory scheme for the Gulf of Mexico designed to facilitate the provision of cellular service to unserved areas of the Gulf region and resolve operational conflicts between Gulf and land carriers, while minimizing the disturbance to existing operations and contractual relationships. *See* Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, WT Docket No. 97–112, Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 97–112, *Report and Order,* 67 FR 9596 (March 4, 2002) (*Gulf Report and Order*). As part of this licensing scheme, the Commission adopted a bifurcated approach for the Gulf that reflected the differences in deployment of cellular service in the Eastern Gulf and the Western Gulf. The Commission determined that the entirety of the Western Gulf would be included within the Gulf of Mexico Exclusive Zone (GMEZ) in which the Gulf carriers would not be subject to use-or-lose rules, but would have full flexibility to build, relocate, modify and remove offshore facilities without any impact on their rights to provide service to ''unserved'' areas. In the Eastern Gulf, the lack of offshore cellular deployment led the Commission to designate a Gulf of Mexico Coastal Zone (GMCZ) extending from the shoreline seaward twelve nautical miles, in which unserved area licensing rules would apply, while the remainder of the Eastern Gulf was included in the GMEZ, giving Gulf carriers full flexibility to operate beyond the twelve nautical mile limit.

2. By using the existing rules as the basis for its decision in the Western Gulf, the Commission reaffirmed the coastline as the legal demarcation line for the Western Gulf separating the service areas of Gulf and land-based cellular carriers. The *Gulf Report and Order* continued to bar land-based carriers from extending their service area boundaries (SABs) over any portion of the Western Gulf without the consent of the relevant Gulf carrier, regardless of whether the Gulf carrier is serving that portion of the Gulf from an offshore site. Conversely, the Gulf carriers are prohibited in the Western Gulf from extending contours over land that would encroach on areas served by land-based carriers, absent consent. The Commission also determined that because of the different propagation characteristics of radio signals transmitted over land and water, it would continue to use different formulas to determine the SABs of land and water-based sites. Accordingly, the Commission retained the rule that determined the reliable service area of Gulf-based sites using a 28 dBμV/m contour, while using a 32 dBμV/m contour to determine the reliable service area of land-based sites.

3. The *Gulf Report and Order* also addressed the issue of non-cellular commercial mobile radio services (CMRS) services in the Gulf. The Commission declined to create a Gulf licensing area for non-cellular services, noting the lack of support for this alternative in the record. However, the Commission clarified that in CMRS services that do not have a separately licensed Gulf market, licensees serving areas adjacent to the Gulf of Mexico were entitled to extend their coverage offshore. Because most non-cellular services use licensing areas based on county boundaries, which typically extend a specified distance over water pursuant to state law, the *Gulf Report and Order* clarified that such Commission licensing areas were co-extensive with county boundaries. The *Gulf Report and Order* also stated that licensees could extend service further into the Gulf on a secondary basis, provided they did not cause interference to others.

II. Discussion

A. Two-Formula Approach

4. Petroleum Communications, Inc. (PetroCom) contends that the Commission's decision to continue using different formulas to determine the SABs of land and Gulf-based transmitters gives land-based carriers a signal strength advantage over Gulf carriers, thereby enabling land-based carriers to encroach into the Gulf and capture water-based cellular traffic. PetroCom maintains that either Gulf carriers should be entitled to use the 32 dBμV/m land-based formula to determine their predicted signal strength at the coastal boundary, or alternatively that the 28 dBμV/m water-based formula should be used by land-based as well as Gulf carriers. PetroCom also asserts that the Commission's adoption of the two-formula approach lacks adequate basis in the record and is procedurally flawed.

5. The Commission affirms its decision to use the two-formula approach in calculating service area contours for land-based and Gulf carriers. This approach recognizes a basic fact of signal propagation: due to the absence of path obstructions and typically quieter RF environment, a signal transmitted over water is likely to be stronger than a signal transmitted over land at the equivalent distance from the transmitter. The 32 dBμV/m land-based formula incorporates factors that typically affect propagation of signals over land, such as rolling terrain. The land formula also assumes a noisier environment and that the subscriber will be using a mobile handset near ground level. On the other hand, assumptions factored into the 28 dBμV/m water formula are quite different. The water formula assumes that a signal in the Gulf will not have the same path obstructions encountered

by radio signals over land. The water formula does not factor in rolling terrain, presumes a quieter noise environment, and also takes into account the different characteristics of water-borne cellular receivers, which are typically mast-mounted and therefore able to receive a signal at a greater distance from the transmitter. Thus, the water formula assumes that the typical Gulf subscriber operating on a boat or drilling platform will have a receive unit with a mast-mounted antenna at a height of approximately 30 feet.

6. Indeed, using 28 dBμV/m as the basis for defining reliable service over water was originally proposed by PetroCom itself, which contended that it more accurately approximated actual coverage in the Gulf. PetroCom previously argued that 28 dBμV/m more accurately predicted reliable service in the Gulf due to the stronger propagation characteristics of over-water transmissions. In support of this argument, PetroCom submitted actual received power measurements from Gulf facilities to what it characterized as a typical mobile unit for a Gulf subscriber. The Commission concluded that PetroCom's technical exhibit provided a convincing demonstration of the service range of typical cellular facilities found in the Gulf, and therefore established the formula based on the data submitted by PetroCom.

7. The Commission also rejects PetroCom's argument that a single formula will ''equalize'' the signal strengths of land-based and Gulf carriers at the shoreline. If the Commission was to apply the land-based formula to establish the SABs of both land-based and Gulf carriers, as PetroCom proposes, the actual signal strength of the Gulf carrier's signal at the shoreline would very likely be higher than 32 dBμV/m. Because the land formula assumes rolling terrain that is not encountered over water, it will tend to underestimate the actual strength of a signal transmitted over water at the SAB radial distance. Thus, while the land formula will indicate that the Gulf carrier's SAB does not encroach on land, the Gulf carrier's actual 32 dBμV/m contour is likely to extend inland. Accordingly, use of the land formula over water could result in the Gulf carrier having an actual signal strength at the boundary that is greater than that of the adjacent land carrier, thereby leading to potential capture of the land carrier's customers. Alternatively, if the Commission were to apply the water formula to both land-based and Gulf carriers, the result would likely be dead spots and undesired carrier capture along the coastline. The water formula does not take into account variations in terrain that are present in over-land transmissions; accordingly, although use of the formula may make it appear that the land carrier has an adequate signal at the shoreline, in fact the signal may well be substantially weaker. In contrast, the Gulf carrier would be operating at a signal strength sufficient to provide reliable service. The use of the water formula by all parties would therefore likely lead to capture of land traffic by the Gulf carrier because of the stronger Gulf signal.

8. PetroCom argues that using different formulas for land-based and Gulf carriers gives a signal strength advantage to land carriers and thereby will cause subscriber capture problems for Gulf carriers. The Commission agrees that the two-formula approach will not prevent subscriber capture in all situations, and that capture of Gulf traffic by land carriers may occur on occasion. The Commission has always acknowledged that these formulas are theoretical models that approximate but do not precisely predict the extent of actual coverage provided by carriers beyond their respective sides of the coastline. However, in situations where the majority of the signal path is over a single medium—land or water—the two-formula approach provides the most reasonable estimate of a given station's service area. The Commission concludes that the PetroCom's proposal does not provide a better solution to subscriber capture than the two-formula approach, and that it is more likely to exacerbate capture problems in comparison to the two-formula approach.

9. PetroCom further argues that the two-formula approach does not preserve the status quo, but actually gives land-based carriers a bargaining advantage in negotiating agreements with Gulf carriers. However, because the *Gulf Report and Order* prohibits land carriers from extending their SAB contours anywhere into the Western Gulf, a land carrier seeking to place a site close to the boundary has no choice but to negotiate with the applicable Gulf carrier, regardless of whether the Gulf carrier has a facility in the area.

10. PetroCom also notes that it has negotiated agreements with land-based carriers in which both parties agreed to use of the land formula. This is not an argument for adopting the land formula as an across-the-board rule. The Commission found that land and Gulf carriers had been using the existing formulas and had been successful in reaching negotiated agreements under the existing framework. The Commission consequently found that changing the SAB definitions could lead to one side or the other unilaterally increasing their transmitter power under the revised definitions, which could upset existing agreements and create new conflicts. Parties remain free to negotiate alternative arrangements. PetroCom's current extension and co-location agreements with land carriers (where PetroCom has filed applications showing a 32 dBμV/m contour) were the end result of negotiations, rather than the starting points.

11. PetroCom further argues that in *Petroleum Communications, Inc.* v. *FCC*, 22 F.3d 1164 (DC Cir. 1994) (*PetroCom*), the DC Circuit Court vacated the water formula, and reinstated the original cellular rule that defined reliable service, which was based on a 39 dBμV/m contour. Accordingly, PetroCom argues, it is entitled under the ''status quo'' to a signal strength of 39 dBμV/m at the coastline, a significantly stronger signal than either 28 or 32 dBμV/m. The Commission disagrees with PetroCom's characterization of the effect of the remand on this issue. The issue that the Gulf carriers raised and which the DC Circuit Court remanded was whether the Gulf carriers should be limited to areas of actual service in light of their dependence on itinerant offshore platforms as sites for their transmitters. The Court held that the Commission had not addressed why it was treating land and Gulf carriers in the same manner (*i.e.*, limiting both land and Gulf carriers to areas of actual service) even though the Gulf carriers are dependent on oil and gas rigs as transmitter sites.

12. Accordingly, the Court remanded ''this issue to the Commission with instructions to vacate § 22.903(a) [now § 22.911(a)] insofar as it applies to [Gulf of Mexico Service Area (GMSA)] licensees pending reconsideration.'' Pending resolution of the remand, the Commission adopted a note to paragraph (a) of the rule, in which it identified the status quo: ''[U]ntil further notice, the authorized CGSAs of the cellular systems licensed to serve the GMSA are those which were authorized prior to January 11, 1993.'' The Commission believed then, and continues to believe now that the Court's intent was to direct the Commission to vacate only that portion of former § 22.903(a) that limited Gulf licensees' CGSAs to their existing areas of actual service—the only issue as to which the Court was remanding—and not to compel the Commission to also vacate the formula it had adopted for determining reliable service in the Gulf, as to which no objection had been made

and which played no role in defining the previous CGSA which was reinstated during the interim as a result of the Court's decision.

13. Following the *PetroCom* remand, the Commission has applied the 28 dBμV/m water formula as the applicable standard for Gulf carriers. This is consistent with its policy that, to the extent that Gulf carriers are allowed to serve up to the boundary of the GMSA, *i.e.*, the shoreline, they are permitted to operate at a height and power sufficient to provide reliable service at the shoreline. The use of the 39 dBμV/m field strength by Gulf carriers is inappropriate because it is clearly counter to data submitted to the Commission regarding the field strength necessary for reliable service by either land or water carriers. Indeed, carriers other than PetroCom have understood that the Gulf carriers were subject to the water formula. For example, Bachow/Coastel, the B-Block Gulf carrier, engineered its systems using the water formula as the applicable standard, and entered into agreements based on that formula.

B. ''Hybrid'' Formula Proposal

14. In the *Gulf Report and Order*, the Commission declined to adopt its proposal to create a Coastal Zone that would encompass coastal waters in both the Eastern and Western Gulf, and proposed to develop a ''hybrid'' propagation formula that would be used by both land-based and Gulf carriers to measure service area contours within the Coastal Zone. The Commission noted that the record reflected little support for a hybrid formula, and found that it would be difficult to establish a single formula that would accurately account for the variations in signal propagation over both land and water. The Commission finds no merit in PetroCom's contention that the Commission erred in rejecting a hybrid approach in favor of retaining the two-formula approach. First, the proposal to create a hybrid formula was linked to the proposal to establish a Coastal Zone that could be served by both land and Gulf carriers, which the Commission ultimately did not adopt. Once the Commission decided to retain existing rules rather than establish a Coastal Zone in both the Eastern and Western Gulf, there was no longer a need to pursue development of a hybrid signal propagation formula as previously proposed. Second, the Commission rejects PetroCom's contention that there was a sufficient record to justify, much less compel, adoption of a hybrid formula. Although there were indeed some commenters who supported use of a hybrid formula, others did not. Moreover, few commenters actually proposed specific technical criteria for the development of such a formula, and the Commission found that those who did failed to provide the type of detailed technical analysis or supporting data (such as measurements) necessary to support their proposals. Given these and other factors, the Commission continues to believe that a hybrid formula would be very difficult to develop, and that the benefits of such a formula do not outweigh the costs and complications involved in establishing and employing one.

C. Regulatory Flexibility Act Requirements

15. PetroCom argues that the Commission violated the Regulatory Flexibility Act (RFA) because its Initial Regulatory Flexibility Analysis (IRFA) did not describe the potential impact on Gulf carriers of retaining the two-formula approach. PetroCom further argues that the Final Regulatory Flexibility Analysis (FRFA) in the *Gulf Report and Order* was flawed because it did not contain a description of the steps the Commission has taken to minimize the significant economic impact on the Gulf carriers of continuing to allow land carriers to utilize the land formula. PetroCom also contends that the Commission was required to include a statement in the FRFA why proposals for the use of ''an equal strength rule'' were rejected as alternatives.

16. The RFA requires that agencies evaluate the effect that new regulations will have on small business entities. 5 U.S.C. 601 *et seq.* When proposing a new rule, agencies must perform an IRFA discussing the proposed new rule's impact on small entities. Further, when adopting a final rule, the agency must also perform a FRFA. The Commission complied with these requirements. PetroCom incorrectly asserts that as part of the RFA process, the Commission was required to analyze the effects that retaining existing rules would have on small entities. The Commission's decision to continue applying existing rules was not a new undertaking that falls under the provisions of the RFA. Instead, after reviewing alternatives, the Commission determined that, in light of the difficulties of adopting a single formula that would apply in all cases, the existing regulatory environment should be retained because of the flexibility provided by the Commission's rules for parties to enter into agreements that would allow carriers to choose for themselves which operating parameters to apply. This decision did not require additional discussion in the FRFA.

D. PetroCom Co-location Applications

17. In December 1992, the Commission began accepting Phase II applications for unserved area licenses in the GMSA. However, following the *PetroCom* remand, the Commission suspended processing of these applications pending reconsideration of the Commission's policies in the Gulf region. Similarly, the Commission ceased processing *de minimis* extension requests along the Gulf coast due to uncertainty regarding the rules for the GMSA. In the *Gulf Report and Order*, the Commission dismissed all pending Phase II applications and extension requests (as well as associated petitions to deny). The Commission reasoned that in light of length of time since the applications had been filed, the fairest and most efficient resolution was to dismiss all pending applications and allow the carriers to reapply. In dismissing all pending Phase II and *de minimis* extension applications, however, the Commission erroneously dismissed a number of PetroCom's applications that were filed pursuant to agreements to co-license sites on land in markets adjacent to the Gulf of Mexico. A major goal of the *Gulf Report and Order* was to encourage parties to reach negotiated solutions to issues such as coverage, capture, and roaming rates. The policies set out in the *Gulf Report and Order* were also aimed at ensuring that existing contractual relationships are not disturbed. The dismissal of PetroCom's applications based on negotiated co-location agreements runs counter to that goal. Accordingly, the Commission reinstates the applications cited in PetroCom's petition to pending status.

E. Clarification Regarding Extensions Into the GMEZ

18. In the *Gulf Report and Order*, the Commission gave the Gulf carriers full flexibility to build, relocate, modify, and remove offshore facilities throughout the GMEZ without seeking prior Commission approval or facing competing applications. Further, the Commission chose not to allow land carriers to make *de minimis* extensions into unserved areas of the GMEZ. The Commission agrees with PetroCom that the Commission's rules as currently worded may cause some confusion. Accordingly, the Commission clarifies that land-based carriers are precluded from extending their SABs into any part of the GMEZ, whether served by the applicable Gulf carrier or not, without

the Gulf carrier's consent, and amends rule § 22.912 to reflect this fact.

F. Clarification of Phase II Licensing in the GMSA

19. The Commission also clarifies, on its own motion, the wording of § 22.911(a)(2) to remove confusion. In the *Gulf Report and Order*, the Commission amended § 22.911(a)(2) in order to reflect that areas of the GMCZ would be subject to Phase II licensing and open to all carriers. However, § 22.911(a)(2) in its current form may be misread as applying only to the two original Gulf (GMEZ) carriers. The Commission therefore clarifies that the rule applies to all cell sites actually located in the GMSA (whether in the GMEZ or GMCZ), and not just to GMEZ carriers.

G. Grandfathering of Existing Gulf Carrier Operating Parameters

20. PetroCom argues that it was material error for the Commission not to address an *ex parte* request made by PetroCom in October 2001, proposing that the Commission adopt a grandfathering rule that preserves the current operating parameters of all facilities that existed as of April 17, 1997. PetroCom argues that current operating parameters means the use of 32 dBμV/m contours as calculated using the land formula at the coastline. According to this proposal, all operating parameters, including contour extensions that cross the coastline boundary, would be grandfathered using the land formula. PetroCom's proposal would allow a carrier to modify or construct a new site as long as any new cross-boundary extensions (also calculated using the land formula) remain within the extension of the originally grandfathered contour.

21. The Commission declines to reconsider the grandfathering of existing cellular facilities as proposed by PetroCom. The *Gulf Report and Order* did not affect any existing operating parameters, including the use of the land formula by Gulf carriers or cross-boundary contours, that might have resulted from such agreements. However, while the Commission grandfathered such existing operations, it did not grant carriers, either land carrier or Gulf carrier, a permanent right to encroach across the coastline boundary or the right to Gulf carriers to calculate contours using the land formula in the absence of agreements permitting them to do so. As previously discussed, the use of the land formula by Gulf carriers has never been the *status quo* for the Gulf carriers. Instead, the Gulf carriers are required to operate using the water formula, absent an agreement with the applicable land carrier.

H. Market Boundaries of Personal Communications Service (PCS) Licensees Adjacent to the Gulf of Mexico Are Co-extensive With County Boundaries

22. The Commission found in the *Gulf Report and Order* that it was in the public interest to allow land-based CMRS carriers to extend their coverage offshore, both to increase coverage and service quality for land-based customers along the coastline and to offer service to coastal boating traffic. The Commission further noted that the geographic service area definitions used for most non-cellular CMRS services—including those for PCS—are based on county boundaries, which typically extend over water pursuant to state law. Accordingly, the *Gulf Report and Order* clarified that such Commission licensing areas are co-extensive with the county boundaries on which they are based. The Commission also stated that licensees could provide service extending beyond county boundaries and into the Gulf on a secondary basis so long as they comply with the technical limitations applicable to the radio service and do not cause co-channel or adjacent channel interference to others.

23. VoiceStream Wireless Corp. (VoiceStream) argues that the *Gulf Report and Order* erroneously reduced the rights of existing PCS licensees along the Gulf coast to provide service extending out into the Gulf. VoiceStream and other commenters assert that by defining PCS licensing areas as co-extensive with county boundaries, allowing carriers to provide service in the Gulf beyond county boundaries only on a secondary basis, and leaving open the possibility of licensing separate PCS markets in the Gulf at a later date, the *Gulf Report and Order* has arbitrarily reduced the rights of existing PCS licensees. VoiceStream contends that PCS licensees bordering the Gulf should be expressly authorized to serve the entire Gulf area on a primary basis, and that the Commission should be precluded from establishing a separate PCS licensing area for the Gulf. Alternatively, VoiceStream requests that if the Commission concludes that PCS licensing areas along the Gulf coast are limited to county boundaries, the Commission should redefine the market area boundaries of PCS licensees extending into the Gulf based on the federally-defined Exclusive Economic Zone (EEZ) which extends 200 nautical miles into the Gulf of Mexico.

24. The Commission has clearly stated in its rules and proceedings that PCS is licensed using Major Trading Areas (MTAs) and Basic Trading Areas (BTAs), as defined in the Rand McNally Commercial Atlas and Marketing Guide. *See* Rand McNally, *1992 Commercial Atlas & Marketing Guide,* 123rd Edition, 1992 (*Rand McNally*). Similarly, the PCS technical rules regarding field strength limits at licensing area borders do not entitle licensees to extend service on a primary basis beyond the licensing areas specified on their authorizations. Nothing in the Commission's rules indicates that carriers may serve areas outside of their markets on a primary basis simply because there is no adjacent licensee. To the contrary, the Commission's rules state that the holding of an authorization does not create any rights beyond the terms, conditions and period specified in the authorization. The Commission rejects the argument that its conclusions represent a ''reduction'' in the rights of PCS licensees, because primary rights to serve the Gulf beyond county boundaries were never granted as part of those licenses. The Commission also rejects the argument that it should grant land-based PCS licensees primary rights to serve the Gulf because PCS bidders allegedly relied on the lack of a separate PCS Gulf licensee in setting their bids. The Commission previously rejected a similar argument that bidders for Multipoint Distribution Service licenses along the Gulf coast could reasonably assume that there was no prospect of future licensing of the service in the Gulf. *See* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking,* WT Docket No. 02–68, RM–9718, 67 FR 35083 (May 17, 2002). Finally, the Commission sees no basis to adopt VoiceStream's request that the Commission change the geographic market definitions in PCS to extend existing Gulf coast markets 200 nautical miles into the Gulf based on the federally-defined Exclusive Economic Zone. The Commission adopted the specific market areas for PCS in 1993 after much debate over which type of service area is the most appropriate, and has repeatedly affirmed its decision to use such market areas on reconsideration.

III. Procedural Matters

A. Supplemental FRFA Certification

25. The RFA requires that a regulatory flexibility analysis be prepared for

rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' 5 U.S.C. 601(b). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in the Small Business Act, 15 U.S.C. 632). A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration. As required by the RFA, a FRFA was incorporated in the *Gulf Report and Order.* This Supplemental Final Regulatory Flexibility Analysis is limited to matters raised on reconsideration.

26. Because this decision affects only the small number of carriers providing cellular service along the coastline adjacent to the Gulf of Mexico, the Commission concludes that this action will not affect a substantial number of small businesses. Further, the *Order on Reconsideration* affirms or codifies decisions previously made in the *Gulf Report and Order.* Accordingly, the Commission certifies that this decision will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Order on Reconsideration* including a copy of this certification, in a report to Congress pursuant to the Congressional Review Act of 1996. *See* 5 U.S.C. 801(a)(1)(A). In addition, the *Order on Reconsideration* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**. In this order, the Commission affirms the decision in the *Gulf Report and Order* to use different formulas for predicting the propagation of cellular signals over land and over water as the basis for determining the SABs of land-based and water-based cell sites in the Gulf of Mexico area. The Commission also affirms that the market boundaries of PCS licensees adjacent to the Gulf of Mexico are co-extensive with county boundaries. The Commission also amends rule § 22.912 to codify the Commission's decision in the *Gulf Report and Order* that a land carrier may not extend its SABs into any part of the GMEZ, served or unserved, without the Gulf carrier's consent. Further, the Commission clarifies language in § 22.911(a)(2) to more accurately reflect a rule change made in the *Gulf Report and Order.*

B. Paperwork Reduction Act Analysis

27. This *Order on Reconsideration* has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104–13, and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

IV. Ordering Clauses

28. Pursuant to sections 1, 4(i), 4(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 405, and § 1.429 of the Commission's rules, 47 CFR 1.429, the April 3, 2002 Petition for Partial Reconsideration filed by Petroleum Communications, Inc., is denied in part and granted in part.

29. The February 22, 2002 Petition for Reconsideration filed by Petroleum Communications, Inc., is granted, and that File Nos. 02590–CL–97, 02593–CL–97, 02594–CL–97, 02595–CL–97, 02596–CL–97, 02600–CL–P2–97, and 02407–CL–P2–97 are reinstated and placed in pending status.

30. The Petition for Reconsideration filed by VoiceStream Wireless Corporation is denied.

31. The rule changes set forth below will become effective September 15, 2003.

List of Subjects in 47 CFR Part 22

Public Mobile Services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 22 as follows:

PART 22—PUBLIC MOBILE SERVICES

■ 1. The authority citation for part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309 and 332.

■ 2. Section 22.911 is amended by revising paragraph (a)(2) to read as follows:

§ 22.911 Cellular geographic service area.

* * * * *

(a) * * *

(2) The distance from a cell transmitting antenna located in the Gulf of Mexico Service Area (GMSA) to its SAB along each cardinal radial is calculated as follows:

$$d = 6.895 \times h^{0.30} \times p^{0.15}$$

Where:

d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

* * * * *

■ 3. Section 22.912 is amended by revising paragraphs (a) and (b) to read as follows:

§ 22.912 Service area boundary extensions.

* * * * *

(a) *De minimis extensions.* Except as otherwise provided in paragraphs (b) and (d) of this section, SABs may be extended into adjacent cellular markets if such extensions are *de minimis*, are demonstrably unavoidable for technical reasons of sound engineering design, and do not extend into the CGSA of any other licensee's cellular system on the same channel block, any part of the Gulf of Mexico Exclusive Zone (GMEZ), or into any adjacent cellular market on a channel block for which the five year build-out period has expired.

(b) *Contract extensions.* Except as otherwise provided in paragraph (d) of this section, cellular system licensees may enter into contracts to allow SAB extensions as follows:

(1) The licensee of any cellular system may, at any time, enter into a contract with an applicant for, or licensee of, a cellular system on the same channel block in an adjacent cellular market, to allow one or more SAB extensions into its CGSA only (not into unserved area).

(2) The licensee of the first authorized cellular system on each channel block in the Gulf of Mexico Service Area (GMSA) may enter into a contract with an applicant for, or licensee of, a cellular system on the same channel block in an adjacent cellular market or in the Gulf of Mexico Coastal Zone (GMCZ), to allow one or more SAB extensions into the Gulf of Mexico Exclusive Zone.

(3) The licensee of the first authorized cellular system on each channel block in each cellular market may enter into a contract with an applicant for or licensee of a cellular system on the same channel block in an adjacent cellular market, to allow one or more SAB extensions into its CGSA and/or unserved area in its cellular market, during its five year build-out period.

* * * * *

[FR Doc. 03–18095 Filed 7–16–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 99–87; RM–9332; FCC 03–34]

Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended and Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Federal Communications Commission (FCC) amends its rules to include a long-term schedule for the migration of Private Land Mobile Radio (PLMR) systems, using frequencies in the 150–174 MHz and 421–512 MHz bands, to narrowband technology. Review of the FCC's equipment certification rules and the record revealed a slower pace to narrowband technology than is desired. Therefore, the FCC amended its rules to encourage spectral efficiency in the shared PLMR bands and to facilitate timely transition to narrowband technology in the shared PLMR bands. These amendments to the FCC's rules are intended to produce more efficient use of PLMR spectrum in the 150–174 MHz and 421–512 MHz bands.

DATES: Effective September 15, 2003.

FOR FURTHER INFORMATION CONTACT: Karen Franklin, Esq. Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, at (202) 418–0680, TTY (202) 418–7233, or via E-mail at *kfrankli@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the FCC's *Report and Order,* FCC 03–34, adopted on February 25, 2003, and released on February 12, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *bmillin@fcc.gov.*

1. The major decisions adopted in the Order are as follows. The Order:

- Prohibits the filing of applications for new operations using 25 kHz channels, beginning six months after publication of the Order in the **Federal Register.**
- Prohibits any modification applications that expand the authorized contour of an existing station if the bandwidth for transmissions specified in the modification application is greater than 12.5 kHz, beginning six months after publication of the Order in the **Federal Register.**
- Prohibits the certification of any equipment capable of operating at one voice path per 25 kHz of spectrum, *i.e.* equipment that includes a 25 kHz mode, beginning January 1, 2005.
- Prohibits the manufacture and importation of any 150–174 MHz and 421–512 MHz band equipment that can operate on a 25 kHz bandwidth, beginning January 1, 2008.
- Imposes deadlines for migration to 12.5 kHz technology for PLMRS systems operating in the 150–174 MHz and 421–512 MHz bands. The deadlines are: January 1, 2013 for non-public safety systems, and January 1, 2018 for public safety systems.

Procedural Matters

A. Regulatory Flexibility Act Analyses

2. As required by the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. 604, the FCC has prepared a Final Regulatory Flexibility Analysis of the possible impact of the rule changes contained in this Order on small entities. The Final Regulatory Flexibility Act analysis is set forth further. The FCC's Consumer Information Bureau, Reference Information Center, will send a copy of this Order including the Final to the Chief Counsel for Advocacy of the Small Business Administration.

B. Paperwork Reduction Act of 1995 Analysis

3. This Order does not contain any new or modified information collection. Therefore, it is not subject to the requirements for a paperwork reduction analysis, and we have not performed one.

Final Regulatory Flexibility Analysis

4. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Order in WT Docket 99–87. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Reason for, and Objectives of, the Order

5. The Order adopts rules to promote the transition to narrowband technology in bands 150–174 MHz and 421–512 MHz. Specifically, the FCC amends its rules to impose a deadline for migration to 2.5 kHz technology for non-public safety PLMRS systems operating on those bands, beginning January 1, 2013 and for public safety systems operating on those bands, beginning January 1, 2018. In addition, the FCC amends its rules to prohibit the certification of any equipment capable of operating at one voice path per 25 kHz of spectrum, *i.e.,* multi-mode equipment that includes a 25 kHz mode, beginning January 1, 2005. The FCC also prohibits the manufacture and importation of 25 kHz equipment (including multi-mode equipment that can operate on a 25 kHz bandwidth) beginning January 1, 2008. The FCC amends its rules to prohibit any applications for new operations using 25 kHz channels beginning six months after notice of the Order is published in the **Federal Register.** Further, the FCC amends its rules to prohibit any modification applications that expand the authorized contour of an existing licensee if the bandwidth subject to the modification application is greater than 12.5 kHz, beginning six months after notice of the Order is published in the **Federal Register.** These actions will effect a transition to a narrowband channel plan. The resulting gain in efficiency will ease congestion on the PLMRS channels in these bands.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. No comments or reply comments were filed in direct response to the IRFA. The FCC has, however, reviewed the general comments that may impact small businesses. Much of the potential impact on small businesses arises from the mandatory migration to 12.5 kHz technology beginning on January 1, 2013, the ban on importation and manufacture of 25 kHz equipment after January 1, 2008 and the freeze on new 25 kHz applications. The costs associated with replacement of current systems were cited in opposition to mandatory conversion proposals.

C. Description and Estimate of the Number of Small Entities to Which the Rules Apply

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term

''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 1992, there were approximately 275,801 small organizations.

8. The rule changes effectuated by this Order apply to licensees and applicants of private land mobile frequencies in the 150–174 MHz and 421–512 MHz bands, and to manufactures of radio equipment.

9. *Private Land Mobile Radio.* PLMR systems serve an essential role in a vast range of industrial, business, land transportation and public service activities. These radios are used by companies of all sizes that operate in all U.S. business categories. Because of the vast array of PLMR users, the FCC had not developed, nor would it be possible to develop, a definition of small entities specifically applicable to PLMR users. For the purpose of determining whether a licensee is a small business as defined by the Small Business Administration (SBA), each licensee would need to be evaluated within its own business area. The FCC's fiscal year 1994 annual report indicates that, at the end of fiscal year 1994, there were 1,087,276 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Further, because any entity engaged in a commercial activity is eligible to hold a PLMR license, these rules could potentially impact every small business in the U.S.

10. *Public Safety.* Public safety radio services include police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services. The SBA rules contain a definition for small radiotelephone (wireless) companies, which encompass business entities engaged in radiotelephone communications employing no more that 1,500 persons. There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the FCC estimates that 81,600 (96 percent) are small entities.

11. *Equipment Manufacturers.* We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the SBA's regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

12. This Order adopts rules to promote the transition to narrowband technology for private land mobile licensees, in the 150–174 MHz and 421–512 MHz bands. In particular, applications for operations on 25 kHz equipment will no longer be accepted six months after publication of this item in the **Federal Register.** Additionally, modification applications that expand the authorized contour of an existing licensee if the bandwidth subject to the modification application is greater than 12.5 kHz will be prohibited beginning six months after publication of this item in the **Federal Register.** On January 1, 2005, certification will not be afforded any equipment capable of operating at one voice path per 25 kHz of spectrum. Further, this Order amends the FCC's current rules to prohibit the importation or manufacture of 25 kHz-only equipment beginning on January 1, 2008. All equipment utilized in non-public safety systems on or after January 1, 2018 must utilize a maximum channel bandwidth of 12.5 kHz. Lastly, all equipment utilized in public safety systems on or after January 1, 2018 must utilize a maximum channel bandwidth of 12.5 kHz.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

14. The FCC adopted rules in this Order upon consideration of the economic burden on small businesses. For instance, many commenters supported adoption of rules that would require conversion to 12.5 kHz equipment as early as January 1, 2005. Such a proposal fails to give any consideration to the amortization and life-span of current equipment and the resources available to small entities. Rather than require small business licensees to convert its system to 12.5 kHz or equivalent technology beginning on January 1, 2005, the FCC delays mandatory migration to 12.5 kHz or equivalent technology until January 1, 2013 for non-public safety PLMR systems and until January 1, 2018 for public safety systems. Similarly, the rule changes permit modification to existing licensees, while the comments did not reflect such a consideration. The Order rejected a phased approach that would have burdened licensees to determine which market and which date applied to them. Although the FCC also takes intermediary steps to promote migration to 12.5 kHz equipment, it notes that none of the intermediary steps require the incumbent to immediately cease use of 25 kHz equipment. Exemption from coverage of the rule changes for small businesses would frustrate the purpose of the rule, *i.e.*, migration to more efficient spectrum use, and facilitate continued inefficient use of spectrum.

15. *Report to Congress:* The FCC will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801(a)(1)(A). In addition, the FCC will send another copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register.** *See* 5 U.S.C. 604(b).

Ordering Clauses

16. Accordingly, pursuant to sections 1, 2, 4(i), 5(c), 7(a), 11(b), 301, 302, 303,

307, 308, 309(j) , 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 155(c), 157(a), 161(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351, the Balanced Budget Act of 1997, Public Law Number 105–33, Title III, 111 Stat. 251 (1997), and §§ 1.421 and 1.425 of the FCC's rules, 47 CFR 1.421 and 1.425, it is ordered that the *Second Report and Order* is hereby adopted.

17. It is further ordered that part 90 of the FCC's rule is amended as set forth in the rule changes, and that these rules shall be effective September 15, 2003.

18. The Motion to Accept Supplemental Comments submitted by Industrial Telecommunications Association, Inc. is granted.

List of Subjects in 47 CFR Part 90

Communications equipment, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble the FCC proposes to amend 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r) and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 1. Section 90.20 is amended by removing limitation 27 in the table of paragraph (c)(3) from the following frequencies and by revising paragraphs (d)(27) and (d)(30) to read as follows:

§ 90.20 Public Safety Pool.

* * * * *

(c) * * *

(3) * * *

PUBLIC SAFETY POOL FREQUENCY TABLE

Frequency or band	Class of station(s)	Limitations	Coordinator
*	*	*	*
150.7825	.....do		PM
*	*	*	*
151.0025	.....do	28	PH
*	*	*	*
151.0175	.....do	28	PH
*	*	*	*
151.0325	.....do	28	PH
*	*	*	*
151.0475	.....do	28	PH
*	*	*	*
151.0625	.....do	28	PH
*	*	*	*
151.0775	.....do	28	PH
*	*	*	*
151.0925	.....do	28	PH
*	*	*	*
151.1075	.....do	28	PH
*	*	*	*
151.1225	.....do	28	PH
*	*	*	*
151.1375	.....do	28, 80	PH
*	*	*	*
151.1525	.....do	28	PO
*	*	*	*
151.1675	.....do	28	PO
*	*	*	*
151.1825	.....do	28	PO
*	*	*	*
151.1975	.....do	28	PO
*	*	*	*
151.2125	.....do	28	PO
*	*	*	*
151.2275	.....do	28	PO
*	*	*	*
151.2425	.....do	28	PO
*	*	*	*
151.2575	.....do	28	PO
*	*	*	*
151.2725	.....do	28	PO
*	*	*	*
151.2875	.....do	28	PO
*	*	*	*
151.3025	.....do	28	PO
*	*	*	*
151.3175	.....do	28	PO
*	*	*	*
151.3325	.....do	28	PO
*	*	*	*
151.3475	.....do	28	PO

PUBLIC SAFETY POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
151.3625	.....do	28	PO
* *	* *	* *	*
151.3775	.....do	28	PO
* *	* *	* *	*
151.3925	.....do	28	PO
* *	* *	* *	*
151.4075	.....do	28	PO
* *	* *	* *	*
151.4225	.....do	28	PO
* *	* *	* *	*
151.4375	.....do	28	PO
* *	* *	* *	*
151.4525	.....do	28	PO
* *	* *	* *	*
151.4675	.....do	28	PO
* *	* *	* *	*
151.4825	.....do	28	PO
* *	* *	* *	*
151.4975	.....do	7, 28	PO
* *	* *	* *	*
153.7475	.....do		PX
* *	* *	* *	*
153.7625	.....do		PX
* *	* *	* *	*
153.7775	.....do		PF
* *	* *	* *	*
153.7925	.....do		PX
* *	* *	* *	*
153.8075	.....do		PX
* *	* *	* *	*
153.8225	.....do		PX
* *	* *	* *	*
153.8375	.....do	31	PF
* *	* *	* *	*
153.8525	.....do		PX
* *	* *	* *	*
153.8675	.....do		PX
* *	* *	* *	*
153.8825	.....do		PX
* *	* *	* *	*
153.8975	.....do		PX
* *	* *	* *	*
153.9125	.....do		PX
* *	* *	* *	*
153.9275	.....do		PX
* *	* *	* *	*
153.9425	.....do		PX
* *	* *	* *	*
153.9575	.....do		PF
* *	* *	* *	*
153.9725	.....do		PX
* *	* *	* *	*
153.9875	.....do		PX
* *	* *	* *	*
154.0025	.....do		PX
* *	* *	* *	*
154.0175	.....do		PX
* *	* *	* *	*
154.0325	.....do		PX
* *	* *	* *	*
154.0475	.....do	28	PX
* *	* *	* *	*
154.0625	.....do	28	PX
* *	* *	* *	*
154.0775	.....do	28	PF
* *	* *	* *	*
154.0925	.....do	28	PX
* *	* *	* *	*
154.1075	.....do	28	PX
* *	* *	* *	*
154.1225	.....do	28	PX

PUBLIC SAFETY POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
154.1375	.....do	28	PF
* *	* *	* *	*
154.1525	.....do	28	PF
* *	* *	* *	*
154.1675	.....do	28	PF
* *	* *	* *	*
154.1825	.....do	28	PF
* *	* *	* *	*
154.1975	.....do	28	PF
* *	* *	* *	*
154.2125	.....do	28	PF
* *	* *	* *	*
154.2275	.....do	28	PF
* *	* *	* *	*
154.2425	.....do	28	PF
* *	* *	* *	*
154.2575	.....do	28	PF
* *	* *	* *	*
154.2725	.....do	19, 28	PF
* *	* *	* *	*
154.2875	.....do	19, 28	PF
* *	* *	* *	*
154.3025	.....do	19, 28	PF
* *	* *	* *	*
154.3175	.....do	28	PF
* *	* *	* *	*
154.3325	.....do	28	PF
* *	* *	* *	*
154.3475	.....do	28	PF
* *	* *	* *	*
154.3625	.....do	28	PF
* *	* *	* *	*
154.3775	.....do	28	PF
* *	* *	* *	*
154.3925	.....do	28	PF
* *	* *	* *	*
154.4075	.....do	28	PF
* *	* *	* *	*
154.4225	.....do	28	PF
* *	* *	* *	*
154.4375	.....do	28	PF
* *	* *	* *	*
154.4525	.....do	28, 80	PF
* *	* *	* *	*
154.6575	.....do		PP
* *	* *	* *	*
154.6725	.....do	16	PP
* *	* *	* *	*
154.6875	.....do	16	PP
* *	* *	* *	*
154.7025	.....do	16	PP
* *	* *	* *	*
154.7175	.....do		PP
* *	* *	* *	*
154.7325	.....do		PP
* *	* *	* *	*
154.7475	.....do		PP
* *	* *	* *	*
154.7625	.....do		PP
* *	* *	* *	*
154.7775	.....do		PP
* *	* *	* *	*
154.7925	.....do		PP
* *	* *	* *	*
154.8075	.....do		PP
* *	* *	* *	*
154.8225	.....do		PP
* *	* *	* *	*
154.8375	.....do		PP
* *	* *	* *	*
154.8525	.....do		PP

PUBLIC SAFETY POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
154.8675	do		PP
* *	* *	* *	*
154.8825	do		PP
* *	* *	* *	*
154.8975	do		PP
* *	* *	* *	*
154.9125	do	16	PP
* *	* *	* *	*
154.9275	do	16	PP
* *	* *	* *	*
154.9425	do	16	PP
* *	* *	* *	*
154.9575	do		PP
* *	* *	* *	*
154.9725	do		PX
* *	* *	* *	*
154.9875	do		PX
* *	* *	* *	*
155.0025	do		PX
* *	* *	* *	*
155.0175	do		PP
* *	* *	* *	*
155.0325	do		PX
* *	* *	* *	*
155.0475	do		PX
* *	* *	* *	*
155.0625	do		PX
* *	* *	* *	*
155.0775	do		PP
* *	* *	* *	*
155.0925	do		PX
* *	* *	* *	*
155.1075	do		PX
* *	* *	* *	*
155.1225	do		PX
* *	* *	* *	*
155.1375	do		PP
* *	* *	* *	*
155.1525	do		PX
* *	* *	* *	*
155.1675	do	10	PS
* *	* *	* *	*
155.1825	do	10	PS
* *	* *	* *	*
155.1975	do		PP
* *	* *	* *	*
155.2125	do	10	PS
* *	* *	* *	*
155.2275	do	10	PS
* *	* *	* *	*
155.2425	do	10	PS
* *	* *	* *	*
155.2575	do		PP
* *	* *	* *	*
155.2725	do	10	PS
* *	* *	* *	*
155.2875	do	10	PS
* *	* *	* *	*
155.3025	do	10	PS
* *	* *	* *	*
155.3175	do		PP
* *	* *	* *	*
155.3325	do	38, 39	PM
* *	* *	* *	*
155.3475	do	39, 40	PM
* *	* *	* *	*
155.3625	do	38, 39	PM
* *	* *	* *	*
155.3775	do		PP
* *	* *	* *	*
155.3925	do	38, 39	PM

PUBLIC SAFETY POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
155.4075	.....do	38, 39	PM
* *	* *	* *	*
155.4225	.....do		PP
* *	* *	* *	*
155.4375	.....do		PP
* *	* *	* *	*
155.4525	.....do	16	PP
* *	* *	* *	*
155.4675	.....do	16	PP
* *	* *	* *	*
155.4825	.....do	41	PP
* *	* *	* *	*
155.4975	.....do		PP
* *	* *	* *	*
155.5125	.....do	16	PP
* *	* *	* *	*
155.5275	.....dof		PP
* *	* *	* *	*
155.5425	.....do		PP
* *	* *	* *	*
155.5575	.....do		PP
* *	* *	* *	*
155.5725	.....do		PP
* *	* *	* *	*
155.5875	.....do		PP
* *	* *	* *	*
155.6025	.....do		PP
* *	* *	* *	*
155.6175	.....do		PP
* *	* *	* *	*
155.6325	.....do		PP
* *	* *	* *	*
155.6475	.....do		PP
* *	* *	* *	*
155.6625	.....do		PP
* *	* *	* *	*
155.6775	.....do		PP
* *	* *	* *	*
155.6925	.....do		PP
* *	* *	* *	*
155.7075	.....do		PP
* *	* *	* *	*
155.7225	.....do		PX
* *	* *	* *	*
155.7375	.....do		PP
* *	* *	* *	*
155.7525	.....do	80, 83	PX
* *	* *	* *	*
155.7675	.....do		PX
* *	* *	* *	*
155.7825	.....do		PX
* *	* *	* *	*
155.7975	.....do		PP
* *	* *	* *	*
155.8125	.....do		PX
* *	* *	* *	*
155.8275	.....do		PX
* *	* *	* *	*
155.8425	.....do		PX
* *	* *	* *	*
155.8575	.....do		PP
* *	* *	* *	*
155.8725	.....do		PX
* *	* *	* *	*
155.8875	.....do		PX
* *	* *	* *	*
155.9025	.....do		PX
* *	* *	* *	*
155.9175	.....do		PP
* *	* *	* *	*
155.9325	.....do		PX

PUBLIC SAFETY POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
155.9475	do		PX
* *	* *	* *	*
155.9625	do		PX
* *	* *	* *	*
155.9775	do		PP
* *	* *	* *	*
155.9925	do		PX
* *	* *	* *	*
156.0075	do		PX
* *	* *	* *	*
156.0225	do		PX
* *	* *	* *	*
156.0375	do		PP
* *	* *	* *	*
156.0525	do		PH
* *	* *	* *	*
156.0675	do		PH
* *	* *	* *	*
156.0825	do		PH
* *	* *	* *	*
156.0975	do		PP
* *	* *	* *	*
156.1125	do		PH
* *	* *	* *	*
156.1275	do		PH
* *	* *	* *	*
156.1425	do		PH
* *	* *	* *	*
156.1575	do		PP
* *	* *	* *	*
156.1725	do		PH
* *	* *	* *	*
156.1875	do		PH
* *	* *	* *	*
156.2025	do		PH
* *	* *	* *	*
156.2175	do		PP
* *	* *	* *	*
156.2325	do		PH
* *	* *	* *	*
158.7375	do		PP
* *	* *	* *	*
158.7525	do		PX
* *	* *	* *	*
158.7675	do		PX
* *	* *	* *	*
158.7825	do		PX
* *	* *	* *	*
158.7975	do		PP
* *	* *	* *	*
158.8125	do		PX
* *	* *	* *	*
158.8275	do		PX
* *	* *	* *	*
158.8425	do		PX
* *	* *	* *	*
158.8575	do		PP
* *	* *	* *	*
158.8725	do		PX
* *	* *	* *	*
158.8875	do		PX
* *	* *	* *	*
158.9025	do		PX
* *	* *	* *	*
158.9175	do		PP
* *	* *	* *	*
158.9325	do		PX
* *	* *	* *	*
158.9475	do		PX
* *	* *	* *	*
158.9625	do		PX

PUBLIC SAFETY POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
158.9775	do		PP
* *	* *	* *	*
158.9925	do		PH
* *	* *	* *	*
159.0075	do		PH
* *	* *	* *	*
159.0225	do		PH
* *	* *	* *	*
159.0375	do		PP
* *	* *	* *	*
159.0525	do		PH
* *	* *	* *	*
159.0675	do		PH
* *	* *	* *	*
159.0825	do		PH
* *	* *	* *	*
159.0975	do		PP
* *	* *	* *	*
159.1125	do	43	PH
* *	* *	* *	*
159.1275	do	43	PH
* *	* *	* *	*
159.1425	do	43	PH
* *	* *	* *	*
159.1575	do		PP
* *	* *	* *	*
159.1725	do	43	PH
* *	* *	* *	*
159.1875	do		PH
* *	* *	* *	*
159.2025	do		PH
* *	* *	* *	*
159.2175	do		PP
* *	* *	* *	*
159.2325	do		PO
* *	* *	* *	*
159.2475	do	46	PO
* *	* *	* *	*
159.2625	do	46	PO
* *	* *	* *	*
159.2775	do	46	PO
* *	* *	* *	*
159.2925	do	46	PO
* *	* *	* *	*
159.3075	do	46	PO
* *	* *	* *	*
159.3225	do	46	PO
* *	* *	* *	*
159.3375	do	46	PO
* *	* *	* *	*
159.3525	do	46	PO
* *	* *	* *	*
159.3675	do	46	PO
* *	* *	* *	*
159.3825	do	46	PO
* *	* *	* *	*
159.3975	do	46	PO
* *	* *	* *	*
159.4125	do	46	PO
* *	* *	* *	*
159.4275	do	46	PO
* *	* *	* *	*
159.4425	do	46	PO
* *	* *	* *	*
159.4575	do		PO
* *	* *	* *	*
159.4725	do	80	PO
* *	* *	* *	*

* * * * *

(d) * * *

(27) In the 450–470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(30) This frequency will be authorized a channel bandwidth of 25 kHz notwithstanding §§ 90.203 and 90.209.

■ 2. Section 90.35 is amended by removing limitation 30 in the table of paragraph (b)(3) from the following frequencies, by adding in numerical order the following frequencies 151.820, 151.880 and 151.940 and by revising paragraphs (c)(29) and (c)(30) to read as follows:

§ 90.35 Industrial/Business Pool.

* * * * *

(b) * * *

(3) * * *

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE

Frequency or band	Class of station(s)	Limitations	Coordinator
*	*	*	*
150.8525	...do		LA
*	*	*	*
150.8675	...do		LA
*	*	*	*
150.8825	...do		LA
*	*	*	*
150.8975	...do		LA
*	*	*	*
150.9425	...do		LA
*	*	*	*
150.9575	...do		LA
*	*	*	*
150.9725	...do		LA
*	*	*	*
150.9875	...do	8	IP
*	*	*	*
151.0025	...do	31.	
*	*	*	*
151.0175	...do	31.	
*	*	*	*
151.0325	...do	31.	
*	*	*	*
151.0475	...do	31.	
*	*	*	*
151.0925	...do	31.	
*	*	*	*
151.1075	...do	31.	
*	*	*	*
151.1225	...do	31.	
*	*	*	*
151.1375	...do	31.	
*	*	*	*
151.1525	...do	31.	
*	*	*	*
151.1675	...do	31.	
*	*	*	*
151.2125	...do	31.	
*	*	*	*
151.2275	...do	31.	
*	*	*	*
151.2425	...do	31.	
*	*	*	*
151.2575	...do	31.	
*	*	*	*
151.2725	...do	31.	
*	*	*	*
151.2875	...do	31.	
*	*	*	*
151.3325	...do	31.	
*	*	*	*
151.3475	...do	31.	
*	*	*	*
151.3625	...do	31.	
*	*	*	*
151.3775	...do	31.	
*	*	*	*
151.3925	...do	31.	
*	*	*	*
151.4075	...do	31.	
*	*	*	*
151.4225	...do	31.	

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
151.4375	.....do	31.	
* *	* *	* *	*
151.4525	.....do	31.	
* *	* *	* *	*
151.4675	.....do	31.	
* *	* *	* *	*
151.4825	.....do	31.	
* *	* *	* *	*
151.4975	.....do	32.	
* *	* *	* *	*
151.5125	.....do	17.	
* *	* *	* *	*
151.5275	.....do		
* *	* *	* *	*
151.5425	.....do		
* *	* *	* *	*
151.5575	.....do		
* *	* *	* *	*
151.5725	.....do		
* *	* *	* *	*
151.5875	.....do		
* *	* *	* *	*
151.6025	.....do		
* *	* *	* *	*
151.6475	.....do		
* *	* *	* *	*
151.6625	.....do		
* *	* *	* *	*
151.670	.....do		
* *	* *	* *	*
151.6775	.....do		
* *	* *	* *	*
151.700	.....do	10, 34.	
* *	* *	* *	*
151.7225	.....do		
151.730	.....do		
151.7375	.....do		
* *	* *	* *	*
151.760	.....do		
* *	* *	* *	*
151.7825	.....do		
151.790	.....do		
151.7975	.....do		
* *	* *	* *	*
151.820	Mobile	12, 14, 35	
* *	* *	* *	*
151.8425	.....do		
151.850	.....do		
151.8575	.....do		
* *	* *	* *	*
151.880	Mobile	12, 14, 35	
* *	* *	* *	*
151.9025	.....do		
151.910	.....do		
151.9175	.....do		
* *	* *	* *	*
151.940	Mobile.		
* *	* *	* *	*
151.9625	.....do		
151.970	.....do		
151.9775	.....do		
* *	* *	* *	*
151.2775	.....do		
* *	* *	* *	*
151.2925	.....do		
* *	* *	* *	*
152.3075	.....do		
* *	* *	* *	*
152.3225	.....do		
* *	* *	* *	*
152.3375	.....do		
* *	* *	* *	*
152.3525	.....do	6.	

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
152.3675	.....do	6.	
* *	* *	* *	*
152.3825	.....do	6.	
* *	* *	* *	*
152.3975	.....do	6.	
* *	* *	* *	*
152.4125	.....do	6.	
* *	* *	* *	*
152.4275	.....do	6.	
* *	* *	* *	*
152.4425	.....do	6.	
* *	* *	* *	*
152.4575	.....do	6.	
* *	* *	* *	*
152.8775	.....do		
* *	* *	* *	*
152.8925	.....do		
* *	* *	* *	*
152.9075	.....do		
* *	* *	* *	*
152.9225	.....do		
* *	* *	* *	*
152.9375	.....do		
* *	* *	* *	*
152.9525	.....do		
* *	* *	* *	*
152.9675	.....do		
* *	* *	* *	*
152.9825	.....do		
* *	* *	* *	*
152.9975	.....do		
* *	* *	* *	*
153.0125	.....do		
* *	* *	* *	*
153.0275	.....do		
* *	* *	* *	*
153.0425	.....do.		
* *	* *	* *	*
153.0575	.....do	4, 7	IP
* *	* *	* *	*
153.0725	.....do		IP
* *	* *	* *	*
153.0875	.....do	4, 7	IP
* *	* *	* *	*
153.1025	.....do	80	IP
* *	* *	* *	*
153.1175	.....do	4, 7	IP
* *	* *	* *	*
153.1325	.....do		IP
* *	* *	* *	*
153.1475	.....do	4, 7	IP
* *	* *	* *	*
153.1625	.....do		IP
* *	* *	* *	*
153.1775	.....do	4, 7	IP
* *	* *	* *	*
153.1925	.....do		IP
* *	* *	* *	*
153.2075	.....do	4, 7	IP
* *	* *	* *	*
153.2225	.....do		IP
* *	* *	* *	*
153.2375	.....do	4, 7	IP
* *	* *	* *	*
153.2525	.....do		IP
* *	* *	* *	*
153.2675	.....do	4, 7	IP
* *	* *	* *	*
153.2825	.....do		IP
* *	* *	* *	*
153.2975	.....do	4, 7	IP

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
153.3125	.....do		IP
* *	* *	* *	*
153.3275	.....do	4, 7	IP
* *	* *	* *	*
153.3425	.....do		IP
* *	* *	* *	*
153.3575	.....do	4, 7	IP
* *	* *	* *	*
153.3725	.....do		IP
* *	* *	* *	*
153.3875	.....do		IP
* *	* *	* *	*
153.4025	.....do		IP
* *	* *	* *	*
153.4175	.....do		IW
* *	* *	* *	*
153.4325	.....do	80	IP, IW
* *	* *	* *	*
153.4475	.....do	80	IP, IW
* *	* *	* *	*
153.4625	.....do	80	IP, IW
* *	* *	* *	*
153.4775	.....do		IW
* *	* *	* *	*
153.4925	.....do	80	IP, IW
* *	* *	* *	*
153.5075	.....do	80	IP, IW
* *	* *	* *	*
153.5225	.....do	80	IP, IW
* *	* *	* *	*
153.5375	.....do		IW
* *	* *	* *	*
153.5525	.....do	80	IP, IW
* *	* *	* *	*
153.5675	.....do	80	IP, IW
* *	* *	* *	*
153.5825	.....do	80	IP, IW
* *	* *	* *	*
153.5975	.....do		IW
* *	* *	* *	*
153.6125	.....do	80	IP, IW
* *	* *	* *	*
153.6275	.....do	80	IP, IW
* *	* *	* *	*
153.6425	.....do	80	IP, IW
* *	* *	* *	*
153.6575	.....do		IW
* *	* *	* *	*
153.6725	.....do	80	IP, IW
* *	* *	* *	*
153.6875	.....do	80	IP, IW
* *	* *	* *	*
153.7025	.....do		IW
* *	* *	* *	*
153.7175	.....do		IW
* *	* *	* *	*
153.7325	.....do		IW
* *	* *	* *	*
154.4825	Base or Mobile		
* *	* *	* *	*
154.4975	.....do		
154.505	.....do		
* *	* *	* *	*
154.5275	Mobile	10, 34.	
* *	* *	* *	*
154.5475	.....do		
* *	* *	* *	*
154.640	Base	36, 37, 48.	
* *	* *	* *	*
157.4775	.....do	12	LA
* *	* *	* *	*
157.4925	.....do	12	LA

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
157.5075	.....do	12	LA
* *	* *	* *	*
157.5225	.....do	12	LA
* *	* *	* *	*
157.5375	.....do	6.	
* *	* *	* *	*
157.5525	.....do	6.	
* *	* *	* *	*
157.5675	.....do	6.	
* *	* *	* *	*
157.5825	.....do	6.	
* *	* *	* *	*
157.5975	.....do	6.	
* *	* *	* *	*
157.6125	.....do	6.	
* *	* *	* *	*
157.6275	.....do	6.	
* *	* *	* *	*
157.6425	.....do	6.	
* *	* *	* *	*
157.6575	.....do	6.	
* *	* *	* *	*
157.6725	.....do	6.	
* *	* *	* *	*
157.6875	.....do	6.	
* *	* *	* *	*
157.7025	.....do	6.	
* *	* *	* *	*
157.7175	.....do	6.	
* *	* *	* *	*
158.1375	.....do		IW
* *	* *	* *	*
158.1525	.....do		IP, IW
* *	* *	* *	*
158.1675	.....do		IP, IW
* *	* *	* *	*
158.1825	.....do	81	IP, IW
* *	* *	* *	*
158.1975	.....do		IW
* *	* *	* *	*
158.2125	.....do	81	IP, IW
* *	* *	* *	*
158.2275	.....do	81	IP, IW
* *	* *	* *	*
158.2425	.....do	81	IP, IW
* *	* *	* *	*
158.2575	.....do		IW
* *	* *	* *	*
158.2725	.....do	81	IP, IW
* *	* *	* *	*
158.2875	.....do		IP
* *	* *	* *	*
158.3025	.....do		IP
* *	* *	* *	*
158.3175	.....do	4, 7	IP
* *	* *	* *	*
158.3325	.....do		IP
* *	* *	* *	*
158.3475	.....do		
* *	* *	* *	*
158.3625	.....do		IP
* *	* *	* *	*
158.3775	.....do	4, 7	IP
* *	* *	* *	*
158.3925	.....do		
* *	* *	* *	*
158.4075	.....do	17.	
* *	* *	* *	*
158.4225	.....do		IP
* *	* *	* *	*
158.4375	.....do	4, 7	IP

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* * *	* * *	* * *	*
159.4875	do	8	IP
* * *	* * *	* * *	*
159.5025	do		
* * *	* * *	* * *	*
159.5175	do.		
* * *	* * *	* * *	*
159.5325	do.		
* * *	* * *	* * *	*
159.5475	do.		
* * *	* * *	* * *	*
159.5625	do.		
* * *	* * *	* * *	*
159.5775	do.		
* * *	* * *	* * *	*
159.5925	do.		
* * *	* * *	* * *	*
159.6075	do.		
* * *	* * *	* * *	*
159.6225	do.		
* * *	* * *	* * *	*
159.6375	do		
* * *	* * *	* * *	*
159.6525	do		
* * *	* * *	* * *	*
159.6675	do		
* * *	* * *	* * *	*
159.6825	do		
* * *	* * *	* * *	*
159.6975	do		
* * *	* * *	* * *	*
159.7125	do		
* * *	* * *	* * *	*
159.7275	do		
* * *	* * *	* * *	*
159.7425	do		
* * *	* * *	* * *	*
159.7575	do		
* * *	* * *	* * *	*
159.7725	do		
* * *	* * *	* * *	*
159.7875	do		
* * *	* * *	* * *	*
159.8025	do		
* * *	* * *	* * *	*
159.8175	do		
* * *	* * *	* * *	*
159.8325	do		
* * *	* * *	* * *	*
159.8475	do		
* * *	* * *	* * *	*
159.8625	do		
* * *	* * *	* * *	*
159.8775	do		
* * *	* * *	* * *	*
159.8925	do		
* * *	* * *	* * *	*
159.9075	do		
* * *	* * *	* * *	*
159.9225	do		
* * *	* * *	* * *	*
159.9375	do		
* * *	* * *	* * *	*
159.9525	do		
* * *	* * *	* * *	*
159.9675	do		
* * *	* * *	* * *	*
159.9825	do		
* * *	* * *	* * *	*
159.9975	do		
* * *	* * *	* * *	*
160.0125	do		

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
160.0275	....do		
* *	* *	* *	*
160.0425	....do		
* *	* *	* *	*
160.0575	....do		
* *	* *	* *	*
160.0725	....do		
* *	* *	* *	*
160.0875	....do		
* *	* *	* *	*
160.1025	....do		
* *	* *	* *	*
160.1175	....do		
* *	* *	* *	*
160.1325	....do		
* *	* *	* *	*
160.1475	....do		
* *	* *	* *	*
160.1625	....do		
* *	* *	* *	*
160.1775	....do		
* *	* *	* *	*
160.1925	....do		
* *	* *	* *	*
160.2075	....do		
* *	* *	* *	*
160.2225	....do	50	LR
* *	* *	* *	*
160.2375	....do	50	LR
* *	* *	* *	*
160.2525	....do	50	LR
* *	* *	* *	*
160.2675	....do	50	LR
* *	* *	* *	*
160.2825	....do	50	LR
* *	* *	* *	*
160.2975	....do	50	LR
* *	* *	* *	*
160.3125	....do	50	LR
* *	* *	* *	*
160.3275	....do	50	LR
* *	* *	* *	*
160.3425	....do	50	LR
* *	* *	* *	*
160.3575	....do	50	LR
* *	* *	* *	*
160.3725	....do	50	LR
* *	* *	* *	*
160.3875	....do	50	LR
* *	* *	* *	*
160.4025	....do	50	LR
* *	* *	* *	*
160.4175	....do	50	LR
* *	* *	* *	*
160.4325	....do	50, 52	LR
* *	* *	* *	*
160.4475	....do	50, 52	LR
* *	* *	* *	*
160.4625	....do	50, 52	LR
* *	* *	* *	*
160.4775	....do	50, 52	LR
* *	* *	* *	*
160.4925	....do	50, 52	LR
* *	* *	* *	*
160.5075	....do	50, 52	LR
* *	* *	* *	*
160.5225	....do	50, 52	LR
* *	* *	* *	*
160.5375	....do	50, 52	LR
* *	* *	* *	*
160.5525	....do	50, 52	LR

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
160.5675	.....do	50, 52	LR
* *	* *	* *	*
160.5825	.....do	50, 52	LR
* *	* *	* *	*
160.5975	.....do	50, 52	LR
* *	* *	* *	*
160.6125	.....do	50, 52	LR
* *	* *	* *	*
160.6275	.....do	50	LR
* *	* *	* *	*
160.6425	.....do	50	LR
* *	* *	* *	*
160.6575	.....do	50	LR
* *	* *	* *	*
160.6725	.....do	50	LR
* *	* *	* *	*
160.6875	.....do	50	LR
* *	* *	* *	*
160.7025	.....do	50	LR
* *	* *	* *	*
160.7175	.....do	50	LR
* *	* *	* *	*
160.7325	.....do	50	LR
* *	* *	* *	*
160.7475	.....do	50	LR
* *	* *	* *	*
160.7625	.....do	50	LR
* *	* *	* *	*
160.7775	.....do	50	LR
* *	* *	* *	*
160.7925	.....do	50	LR
* *	* *	* *	*
160.8075	.....do	50	LR
* *	* *	* *	*
160.8225	.....do	50	LR
* *	* *	* *	*
160.8375	.....do	50	LR
* *	* *	* *	*
160.8525	.....do	50	LR
* *	* *	* *	*
160.8675	.....do	50, 51	LR
* *	* *	* *	*
160.8825	.....do	50, 51	LR
* *	* *	* *	*
160.8975	.....do	50, 51	LR
* *	* *	* *	*
160.9125	.....do	50, 51	LR
* *	* *	* *	*
160.9275	.....do	50, 51	LR
* *	* *	* *	*
160.9425	.....do	50, 51	LR
* *	* *	* *	*
160.9575	.....do	50, 51	LR
* *	* *	* *	*
160.9725	.....do	50, 51	LR
* *	* *	* *	*
160.9875	.....do	50, 51	LR
* *	* *	* *	*
161.0025	.....do	50, 51	LR
* *	* *	* *	*
161.0175	.....do	50, 51	LR
* *	* *	* *	*
161.0325	.....do	50, 51	LR
* *	* *	* *	*
161.0475	.....do	50, 51	LR
* *	* *	* *	*
161.0625	.....do	50, 51	LR
* *	* *	* *	*
161.0775	.....do	50, 51	LR
* *	* *	* *	*
161.0925	.....do	50, 51	LR

INDUSTRIAL/BUSINESS POOL FREQUENCY TABLE—Continued

Frequency or band	Class of station(s)	Limitations	Coordinator
* *	* *	* *	*
161.1075	....do	50, 51	LR
* *	* *	* *	*
161.1225	....do	50, 51	LR
* *	* *	* *	*
161.1375	....do	50, 51	LR
* *	* *	* *	*
161.1525	....do	50, 51	LR
* *	* *	* *	*
161.1675	....do	50, 51	LR
* *	* *	* *	*
161.1825	....do	50, 51	LR
* *	* *	* *	*
161.1975	....do	50, 51	LR
* *	* *	* *	*
161.2125	....do	50, 51	LR
* *	* *	* *	*
161.2275	....do	50, 51	LR
* *	* *	* *	*
161.2425	....do	50, 51	LR
* *	* *	* *	*
161.2575	....do	50, 51	LR
* *	* *	* *	*
161.2725	....do	50, 51	LR
* *	* *	* *	*
161.2875	....do	50, 51	LR
* *	* *	* *	*
161.3025	....do	50, 51	LR
* *	* *	* *	*
161.3175	....do	50, 51	LR
* *	* *	* *	*
161.3325	....do	50, 51	LR
* *	* *	* *	*
161.3475	....do	50, 51	LR
* *	* *	* *	*
161.3625	....do	50, 51	LR
* *	* *	* *	*
161.3775	....do	50, 51	LR
* *	* *	* *	*
161.3925	....do	50, 52	LR
* *	* *	* *	*
161.4075	....do	50, 52	LR
* *	* *	* *	*
161.4225	....do	50, 52	LR
* *	* *	* *	*
161.4375	....do	50, 52	LR
* *	* *	* *	*
161.4525	....do	50, 52	LR
* *	* *	* *	*
161.4675	....do	50, 52	LR
* *	* *	* *	*
161.4825	....do	50, 52	LR
* *	* *	* *	*
161.4975	....do	50, 52	LR
* *	* *	* *	*
161.5125	....do	50, 52	LR
* *	* *	* *	*
161.5275	....do	50, 52	LR
* *	* *	* *	*
161.5425	....do	50, 52	LR
* *	* *	* *	*
161.5575	....do	50, 52	LR
* *	* *	* *	*

(c) * * *

(29) Except when limited elsewhere, one-way paging transmitters on this frequency may operate with an output power of 350 watts.

(30) In the 450–470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

■ 3. Section 90.203 is amended by revising paragraph (j)(4)(ii) and removing paragraphs (j)(4)(iii) and (4)(iv) and adding paragraph (j)(10) to read as follows:

§ 90.203 Certification required.

* * * * *

(j) * * *

(4) * * *

(ii) 12.5 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 12.5 kHz if it is capable of operating on channels of 6.25 kHz or less.

* * * * *

(10) Transmitters designed to operate in the 150–174 MHz and 421–512 MHz bands that are not equipped with a single-mode or multi-mode function permitting operation with a maximum channel bandwidth of 12.5 kHz or do not meet a spectrum efficiency standard of one voice channel per 12.5 kHz of channel bandwidth shall not be manufactured in, or imported into, the United States after January 1, 2008.

* * * * *

■ 4. Section 90.209 is amended by revising the entries to frequency bands in the table located in paragraph (b)(5) and adding paragraph (b)(6) to read as follows:

§ 90.209 Bandwidth limitations.

* * * * *

(b) * * *

(5) * * *

STANDARD CHANNEL SPACING/BANDWIDTH

Frequency band (MHz)	Channel spacing (kHz)	Authorized bandwidth (kHz)
*	* *	* *
150–174 ..	[1]7.5	[1 3]20/11.25/6
*	* *	* *
421–512 [2]	[1]6.25	[1 3]20/11.25/6
*	* *	* *

[1] For stations authorized on or after August 18, 1995.

[2] Bandwidths for radiolocation stations in the 420–450 MHz band and for stations operating in bands subject to this footnote will be reviewed and authorized on a case-by-case basis.

[3] Operations using equipment designed to operate with a 12.5 kHz channel bandwidth will be authorized an 11.25 kHz bandwidth. Operations using equipment designed to operate with a 6.25 kHz channel bandwidth will be authorized a 6 kHz bandwidth. All non-public safety stations must operate on channels with a bandwidth of 12.5 kHz or less beginning January 1, 2013. All public safety stations must operate on channels with a bandwidth of 12.5 kHz or less beginning January 1, 2018.

* * * * *

(6) No new applications for the 150–174 MHz and/or 421–512 MHz bands will be acceptable for filing if the applicant utilizes channels with a bandwidth exceeding 11.25 kHz beginning January 13, 2004. For stations licensed or applied for prior to January 13, 2004, the licensee may transfer, assign, renew and modify the authorization consistent with the current rules. No modification applications for stations in the 150–174 MHz and/or 421–512 MHz bands that increase the station's authorized interference contour will be acceptable for filing if the applicant utilizes channels with a bandwidth exceeding 11.25 kHz, beginning January 13, 2004. *See* § 90.187(b)(2)(iii) and (iv) of this chapter for interference contour designations and calculations. Applications submitted pursuant to this paragraph must comply with frequency coordination requirements of § 90.175 of this chapter.

* * * * *

[FR Doc. 03–18054 Filed 7–16–03; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 68, No. 137
Thursday, July 17, 2003

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE197; Notice No. 23–03–01–SC]

Special Conditions: AMSAFE, Incorporated, Zenair Model CH2000, Inflatable Three-Point Self-Adjusting Restraint Safety Belt With an Integrated Inflatable Airbag Device

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the installation of an AMSAFE, Inc. Inflatable Three-Point Self-Adjusting Restraint Safety Belt with an Integrated Inflatable Airbag Device on the Zenair model CH2000. This airplane, as modified by AMSAFE, Inc. will have novel and unusual design features associated the lap belt portion of the safety belt containing an integrated airbag device. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Comments must be received on or before August 18, 2003.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration (FAA), Regional Counsel, ACE–7, Attention: Rules Docket, Docket No. CE197, 901 Locust, Room 506, Kansas City, Missouri 64106, or delivered in duplicate to the Regional Counsel at the above address. Comments must be marked: CE197. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Pat Mullen, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Kansas City, Missouri, 816–329–4128, fax 816–329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of these proposed special conditions by submitting such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The proposals described in this notice may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to CE197.'' The postcard will be date stamped and returned to the commenter.

Background

On March 8, 2003, AMSAFE, Inc. Inflatable Restraints Division, 1043 North 47th Avenue, Phoenix, AZ 85043, applied for a supplemental type certificate to install an inflatable lapbelt restraint with a standard upper torso restraint (or shoulder harness) in the Zenair model CH2000. The model CH2000 is a single engine, two-place airplane with a stall speed in the landing configuration that is below 45 knots.

The inflatable restraint system is a three-point restraint system consisting of a shoulder harness and an inflatable airbag lap belt, and will be installed on both the pilot and co-pilot seats. In the event of an emergency landing, the airbag will inflate and provide a protective cushion between the occupant's head and the airplane's yoke and instrument panel. This will reduce the potential for head and torso injury. The inflatable restraint behaves in a manner that is similar to an automotive airbag, but in this case, the airbags are integrated into the lapbelt. The shoulder harness is conventional and does not inflate. While airbags and inflatable restraints are standard in the automotive industry, the use of an inflatable three-point restraint is novel for general aviation operations.

The FAA has determined that this project will be accomplished on the basis of providing the same current level of safety of the model CH2000 occupant restraint design. The FAA has considered the installation of airbags as having two primary safety concerns:

- That they perform properly under foreseeable operating conditions; and
- That they do not perform in a manner or at such times as to impede the pilot's ability to maintain control of the airplane or constitute a hazard to the airplane or occupants.

The latter point has the potential to be the more rigorous of the requirements. An unexpected deployment while conducting the takeoff and landing phases of flight may result in an unsafe condition. The unexpected deployment may either startle the pilot, or generate a force sufficient to cause a sudden movement of the control yoke. Either action could result in a loss of control of the airplane, the consequences of which are magnified due to the low operating altitudes during these phases of flight. The FAA has considered this when establishing the special conditions.

The inflatable airbag is integrated into the lap belt and relies on sensors to electronically activate the inflator for deployment. These sensors could be susceptible to inadvertent activation, causing deployment in a potentially unsafe manner. The consequences of an inadvertent deployment must be considered in establishing the reliability of the system. AMSAFE, Inc. must show that the effects of an inadvertent deployment in flight are not a hazard to the airplane or that an inadvertent deployment is extremely improbable. In addition, any general aviation aircraft can generate a large amount of cumulative wear and tear on a restraint system. It is likely that the potential for inadvertent deployment increases as a

result of this cumulative damage. Therefore, the impact of wear and tear on inadvertent deployment must be considered. Ultimately, because of the effects of this cumulative damage, a life limit must be established for the appropriate system components in the restraint system design.

There are additional factors to be considered to minimize the chances of inadvertent deployment. General aviation airplanes are exposed to a unique operating environment, since the same airplane may be used by both experienced and student pilots. The effect of this environment on inadvertent deployment of the restraint must be understood. Therefore, qualification testing of the firing hardware/software must consider the following:

- The airplane vibration levels appropriate for a general aviation airplane; and
- The inertial loads that result from typical flight or ground maneuvers, including gusts and hard landings.

Any tendency for the firing mechanism to activate as a result of these loads or acceleration levels is unacceptable.

Other influences on inadvertent deployment include high intensity electromagnetic fields (HIRF) and lightning. Since the sensors that trigger deployment are electronic, they must be protected from the effects of these threats. To comply with HIRF and lightning requirements, the AMSAFE, Inc. inflatable restraint system is considered a critical system, since its inadvertent deployment could have a hazardous effect on the airplane.

Given the level of safety of the current Zenair model CH2000 lap belt and shoulder harness restraint, the inflatable restraint must show that it will offer an equivalent level of protection in the event of an emergency landing. In the event of an inadvertent deployment, the restraint must still be at least as strong as a Technical Standard Order certificated belt and shoulder harness. There is no requirement for the inflatable portion of the restraint to offer protection during multiple impacts, where more than one impact would require protection.

The inflatable seatbelt system must deploy and provide protection for each occupant under the crash conditions specified in § 23.562 where it is necessary to prevent serious head injury. The crash pulse specified in § 23.562 is viewed as a suitable threshold for system deployment. It is possible a wide range of occupants will use the inflatable restraint. Thus, the protection offered by this restraint should be effective for occupants that range from the fifth percentile female to the ninety-fifth percentile male. Energy absorption must be performed in a consistent manner for this occupant range.

In support of this operational capability, there must be a means to verify the integrity of this system before each flight. As an option, AMSAFE, Inc. can establish inspection intervals where they have demonstrated the system to be reliable between these intervals.

It is possible that an inflatable restraint will be ''armed'' even though no occupant is using the seat. While there will be means to verify the integrity of the system before flight, it is also prudent to require that unoccupied seats with active restraints not constitute a hazard to any occupant. This will protect any individual performing maintenance items inside the cockpit while the aircraft is on the ground and includes protection against inadvertent deployment.

In addition, the use and operation of this restraint must be transparent to the user. Therefore, the design must prevent the inflatable seatbelt from being incorrectly buckled and/or installed such that the airbag would not properly deploy. As an alternative, AMSAFE, Inc. may show that such deployment is not hazardous to the occupant, and will still provide the required protection.

The cockpit of the model CH2000 is a confined area, and the FAA is concerned that noxious gasses may accumulate in the event of restraint deployment. When deployment does occur, either by design or inadvertently, there must not be a release of hazardous quantities of gas or particulate matter into the cockpit area.

Fire is a concern for any airplane, regardless of the size or class of the airplane. An inflatable restraint should not increase the risk already associated with fire. Therefore, the inflatable restraint should be protected from the effects of fire, so that an additional hazard is not created by, for example, a rupture of the inflator.

Finally, the inflatable restraint is likely to have a large volume displacement, where the inflated bag could impede the egress of an occupant. Since the bag deflates to absorb energy, it is likely that the inflatable restraint would be deflated at the time an occupant would attempt egress. However, it is appropriate to specify a time interval after which the inflatable restraint may not impede rapid egress. Ten seconds has been chosen as reasonable time. This time limit will offer a level of protection throughout the impact event.

Type Certification Basis

Under the provisions of § 21.101, AMSAFE, Inc. must show that the Zenair model CH2000, as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. TA5CH or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in Type Certificate No. TA5CH are as follows:

FAR 21.29 and FAR 23 effective February 1, 1965, as amended by 23–1 through 23–42. JAR–VLA effective April 26, 1990, through Amendment VLA/92/1 effective January 1, 1992, used as a safety equivalence to FAR 23, as provided by AC 23–11. FAR 36 dated December 1, 1969, as amended by current amendment as of date of type certification.

For the model listed above, the certification basis also includes all exemptions, if any; equivalent level of safety findings, if any; and the special conditions adopted by this rulemaking action.

The Administrator has determined that the applicable airworthiness regulations (*i.e.*, part 23 as amended) do not contain adequate or appropriate safety standards for the AMSAFE, Inc. inflatable restraint as installed on Zenair model CH2000 because of a novel or unusual design feature. Therefore, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38, and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to that model under the provisions of § 21.101.

Novel or Unusual Design Features

The Zenair model CH2000 will incorporate the following novel or unusual design feature:

The AMSAFE, Inc. Inflatable Three-Point Self-Adjusting Restraint safety belt with an integrated inflatable airbag device. The purpose of the inflatable airbag seatbelt is to reduce the potential for injury in the event of an accident. In a severe impact, an airbag will deploy from the lapbelt portion of the restraint,

in a manner similar to an automotive airbag. The airbag will deploy between the head of the occupant and the airplane's yoke and instrument panel. This will, therefore, provide some protection to the head of the occupant. The restraint will rely on sensors to electronically activate the inflator for deployment.

The Code of Federal Regulations states performance criteria for seats and restraints in an objective manner. However, none of these criteria are adequate to address the specific issues raised concerning inflatable restraints. Therefore, the FAA has determined that, in addition to the requirements of part 21 and part 23, special conditions are needed to address the installation of this inflatable restraint.

Accordingly, these special conditions are adopted for the Zenair model CH2000 equipped with the AMSAFE, Inc. Three-Point Self-Adjusting Restraint safety belt with an integrated inflatable airbag device. Other conditions may be developed, as needed, based on further FAA review and discussions with the manufacturer and civil aviation authorities.

Applicability

As discussed above, these special conditions are applicable to the Zenair model CH2000 equipped with the AMSAFE, Inc. Three-Point Self-Adjusting Restraint safety belt with an integrated inflatable airbag device. Should AMSAFE, Inc. apply at a later date for a supplemental type certificate to modify any other model on Type Certificate number TA5CH to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on the Zenair model CH2000. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101 for STC or 21.17 for TC; and 14 CFR 11.38 and 11.19.

The Proposed Special Conditions

The FAA has determined that this project will be accomplished on the basis of not lowering the current level of safety for the Zenair model CH2000 occupant restraint design. Accordingly, the FAA proposes the following special conditions as part of the type certification basis for the Zenair model CH2000, as modified by AMSAFE, Inc.

Three-Point Self-Adjusting Restraint Safety Belt with an Integrated Airbag Device

1. It must be shown that the inflatable lapbelt will deploy and provide protection under the crash conditions specified in § 23.562 where it is necessary to prevent serious head injuries. The means of protection must take into consideration a range of stature from a 5th percentile female to a 95th percentile male. The inflatable lapbelt must provide a consistent approach to energy absorption throughout that range.

2. The inflatable lapbelt must provide adequate protection for each occupant. In addition, unoccupied seats that have active seat belts must not constitute a hazard to any occupant.

3. The design must prevent the inflatable safety belt from being incorrectly buckled and/or incorrectly installed such that the airbag would not properly deploy. Alternatively, it must be shown that such deployment is not hazardous to the occupant and will provide the required protection.

4. It must be shown that the inflatable lapbelt system is not susceptible to inadvertent deployment as a result of wear and tear or inertial loads resulting from in-flight or ground maneuvers (including gusts and hard landings) that are likely to be experienced in service.

5. It must be shown (or be extremely improbable) that an inadvertent deployment of the restraint system during the most critical part of the flight does not impede the pilot's ability to maintain control of the airplane or cause an unsafe condition (or hazard to the airplane). In addition, a deployed inflatable restraint must be at least as strong as a Technical Standard Order certificated belt and shoulder harness.

6. It must be shown that deployment of the restraint system is not hazardous to the occupant or result in injuries that could impede rapid egress. This assessment should include occupants whose belt is loosely fastened.

7. It must be shown that an inadvertent deployment that could cause injury to a standing or sitting person is improbable.

8. It must be shown that the inflatable safety belt will not impede rapid egress of the occupants 10 seconds after its deployment.

9. For the purposes of complying with HIRF and lightning requirements, the inflatable safety belt system is considered a critical system since its deployment could have a hazardous effect on the airplane.

10. It must be shown that the inflatable safety belt will not release hazardous quantities of gas or particulate matter into the cabin.

11. The inflatable safety belt installation must be protected from the effects of fire such that no hazard to occupants will result.

12. There must be a means to verify the integrity of the inflatable safety belt activation system prior to each flight or it must be demonstrated to reliably operate between inspection intervals.

13. A life limit must be established for appropriate system components.

14. Qualification testing of the internal firing mechanism must be performed at vibration levels appropriate for a general aviation airplane.

Issued in Kansas City, Missouri on June 27, 2003.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–18071 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–40–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400, 747–400D, 747–400F, 757–200, 757–200PF, 757–200CB, 767–200, 767–300, and 767–300F Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing transport category airplane models, as listed above. This proposal would require a modification of the air data computer (ADC) system, which involves installing certain new circuit breakers, relays, and related components, and making various wiring changes in and between the flight deck and main equipment center. For certain

airplanes, this proposal also would require accomplishment of various other actions prior to or concurrently with the modification of the ADC system. This action is necessary to ensure that the flightcrew is able to silence an erroneous overspeed or stall aural warning. A persistent erroneous warning could confuse and distract the flightcrew and lead to an increase in the flightcrew's workload. Such a situation could lead the flightcrew to act on hazardously misleading information, which could result in loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by September 2, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–40–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2003–NM–40–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Elizabeth Zurcher, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6495; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2003–NM–40–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–40–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports indicating that an erroneous overspeed aural warning that cannot be silenced may occur on certain Boeing Model 747–400, 747–400D, 747–400F, 757–200, 757–200PF, 757–200CB, 767–200, 767–300, and 767–300F series airplanes. When the air data computer (ADC) detects an overspeed condition, the ADC sends a warning through the Engine Indicating and Crew Alerting System (EICAS) and aural warning systems. If the flightcrew finds that this warning is erroneous, following flightcrew procedures to eliminate the erroneous ADC source will remove the erroneous air data source from the flightcrew display and from use in computation of navigation and flight control solutions, but the erroneous aural warning will not be silenced. Inability to silence an erroneous warning could confuse and distract the flightcrew, and lead to an increase in the flightcrew's workload. An erroneous aural warning that cannot be silenced may also cause the flightcrew to act based on misleading information. This may have been a factor in previous airplane incidents in which flightcrew actions based on hazardously misleading information have resulted in loss of control of the airplane.

Explanation of Relevant Service Information

We have reviewed and approved the following Boeing Alert Service Bulletins:

- 747–34A2460, Revision 2, dated June 14, 2001 (for Model 747–400, –400D, and –400F series airplanes), which describes procedures for re-routing wires associated with ADC overspeed warnings to eliminate erroneous overspeed warnings. The procedures involve replacing the P1–1 and P3–1 module assemblies in the flight deck with improved assemblies, installing various wires in and between the flight deck and main equipment center of the airplane, and performing a test of the source select module and a system functional test. This service bulletin specifies that Boeing Service Bulletin 747–31–2179, 747–31–2180, or 747–31–2217 must be accomplished either previously or concurrently. Boeing Alert Service Bulletin 747–34A2460, Revision 2, refers to Boeing Component Service Bulletins 233U2200–31–01 and 233U2205–31–01, both dated April 20, 1995, as additional sources for instructions to change the ADC computer source select switch on the P1–1 and P3–1 panels, respectively.
- 757–34A0222, dated March 28, 2002 (for Model 757–200,–200PF, and –200CB series airplanes), which describes procedures for installing a circuit breaker and replacing an existing lightplate assembly with a new, improved lightplate assembly in the flight compartment; installing two relays and removing a certain relay in the main equipment center; making various wiring changes in the flight compartment and main equipment center; and performing tests of the flight data acquisition unit, flight data recorder system, and stall and overspeed warnings. These changes are intended to allow the flightcrew to silence an erroneous aural overspeed or stall warning by switching away from a failed ADC that is generating the warning. This service bulletin specifies that Boeing Service Bulletin 757–31–0059 must be accomplished either previously or concurrently.

• 767–34A0332, dated January 10, 2002 (for Model 767–200, –300, and –300F series airplanes), which describes procedures for installing two circuit breakers in the flight deck, installing two relays in the main equipment center, making various wiring changes in the flight deck and main equipment center, and doing a system functional test. These changes are intended to allow the flightcrew to silence an erroneous aural overspeed or stall warning by switching away from a failed ADC that is generating the warning. This service bulletin specifies that Boeing Service Bulletins 767–31–0091, 767–31–0098, 767–31–0099, 767–31–0100, or 767–31–0101, as applicable, must be accomplished either previously or concurrently.

Explanation of Other Related Service Information (747–400, –400D and ''400F)

We have reviewed and approved Boeing Service Bulletins 747–31–2179, dated May 26, 1994 (for Boeing Model 747–400 and –400F series airplanes equipped with Pratt & Whitney PW4000 series engines), and 747–31–2180, dated March 17, 1994 (for Boeing Model 747–400 and –400F series airplanes equipped with Rolls-Royce engines). These service bulletins described procedures for replacing the three Electronic Flight Information System (EFIS)/EICAS interface units (EIU) with improved EIUs and installing new software in six integrated display units (IDU) and three EIUs.

We have also reviewed and approved Boeing Service Bulletin 747–31–2217, dated May 19, 1994 (for Boeing Model 747–400, –400D, and –400F series airplanes equipped with General Electric (GE) engines). That service bulletin describes procedures for installing new software in six IDUs and three EIUs.

Boeing Service Bulletin 747–31–2217 specifies that the changes in Boeing Service Bulletins 747–31–2178, dated July 1, 1993, and 747–45–2010, dated December 17, 1992, must be accomplished prior to the actions in Boeing Service Bulletin 747–31–2217. We have reviewed and approved those service bulletins. Boeing Service Bulletin 747–31–2178 describes procedures for replacing three EIUs with improved EIUs and installing new software in six IDUs and three EIUs. Boeing Service Bulletin 747–45–2010 describes procedures for installing new software in the central maintenance computer (CMC).

Boeing Service Bulletin 747–45–2010 specifies that, for airplanes equipped with GE engines, the actions in Boeing Service Bulletins 747–45–2005 and 747–31–2163 must be accomplished prior to or concurrently with those specified in Boeing Service Bulletin 747–45–2010. We have reviewed and approved those service bulletins. Boeing Service Bulletin 747–45–2005, dated February 8, 1990, describes procedures for a modification that involves replacing certain CMCs with improved CMCs, modifying related wiring, and modifying the data loader control panel. Boeing Service Bulletin 747–31–2163, dated February 14, 1991, describes procedures for installing new software in six IDUs and three EIUs.

Explanation of Other Related Service Information (757–200, –200CB, –200PF; 767)

We also have reviewed and approved the following Boeing service bulletins, which all describe procedures for performing an EICAS readout comparison to ensure that the applicable software is used, replacing the existing EICAS computers with new EICAS computers that can be upgraded with certain software, and making related wiring changes:

Boeing service bulletin (all including Appendices A, B, and C)–	Service bulletin revision level–	Service bulletin date–	Effectivity–
757–31–0059	Revision 3	March 29, 2001	Boeing Model 757–200, –200CB, and –200PF series airplanes.
767–31–0091	Revision 3	April 27, 2000	Model 767 series airplanes with certain GE CF6–80C2 Full Authority Digital Electronic Engine Control (FADEC) series engines.
767–31–0098	Revision 2	October 21, 1999	Model 767–200 and –300 series airplanes with certain GE Power Management Computer (PMC) engines.
767–31–0099	Revision 3	February 8, 2001	Model 767–300 series airplanes with certain Rolls Royce engines.
767–31–0100	Revision 2	July 29, 1999	Model 767 series airplanes with certain Pratt & Whitney PW4000 series engines.
767–31–0101	Original	July 6, 2000	Model 767–200 and –300 series airplanes with Pratt & Whitney JT9D series engines.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require accomplishment of the actions specified in the applicable service bulletins described previously, except as discussed below.

Differences Between Service Bulletins and Proposed AD

Operators should note that Boeing Alert Service Bulletins 747–34A2460, Revision 2, 757–34A0222, and 767–34A0332 recommend accomplishing the modification as soon as manpower, materials, and facilities are available. We have determined that such a non-specific compliance time would not address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this AD, we considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, and the time necessary to perform the proposed actions. In light of these factors, we find a 24-month compliance time for completing the proposed actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Also, Boeing Service Bulletins 747–34A2460, Revision 2, and 757–34A0222 specify that operators may accomplish certain actions per a specific chapter of the Airplane Maintenance Manual (AMM) or an ''operator's equivalent procedure.'' However, this proposed AD would require operators to accomplish the actions per the chapter of the AMM specified in the service bulletin. An ''operator's equivalent procedure'' may be used only if approved as an

alternative method of compliance per paragraph (e) of this AD.

Changes to 14 CFR Part 39/Effect on the Proposed AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs our airworthiness directives system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance (AMOCs). Because we have now included this material in part 39, only the office authorized to approve AMOCs is identified in each individual AD.

Explanation of Cost Impact

We have reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $60 per work hour to $65 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Cost Impact

There are approximately 1,872 airplanes of the affected designs in the worldwide fleet. The FAA estimates that 36 Model 747–400, -400D, and -400F series airplanes; 639 Model 757–200, -200CB, and -200PF series airplanes; and 244 Model 767–200, -300, and -300F series airplanes; of U.S. registry would be affected by this proposed AD. Estimates of the costs to accomplish the proposed actions are provided in the following table:

Service bulletin	Work hours per airplane	Hourly labor rate	Parts cost per airplane	Cost per airplane
747–34A2460	158	$65	$1,448–$1,735	$11,718–$12,005
747–31–2179	2	65	None	130
747–31–2180	2	65	None	130
747–31–2217	2	65	None	130
747–31–2178	5	65	None	325
747–45–2010	2	65	None	130
747–45–2005	2	65	None	130
747–31–2163	2	65	None	130
757–34A0222	107	65	12,571–12,953	19,526–19,908
757–31–0059	5	65	None	325
767–34A0332	55	65	9,988–11,167	13,563–14,742
767–31–0091	7	65	None	455
767–31–0098	5	65	None	325
767–31–0099	24	65	None	1,560
767–31–0100	8	65	None	520
767–31–0101	6	65	None	390

We estimate that the total cost to accomplish all actions that may be required for all airplanes that would be affected by this AD may be as much as $17,783,875.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Docket 2003–NM–40–AD.

Applicability: Airplanes as listed in Table 1 of this AD, certificated in any category. Table 1 of this AD follows:

TABLE 1.—APPLICABILITY

Airplane Model—	As Listed in Boeing Alert Service Bulletin—
747–400, 747–400D, 747–400F series airplanes	747–34A2460, Revision 2, dated June 14, 2001.
757–200, 757–200PF, 757–200CB series airplanes	757–34A0222, dated March 28, 2002.
767–200, 767–300, and 767–300F series airplanes	767–34A0332, dated January 10, 2002.

Compliance: Required as indicated, unless accomplished previously.

To ensure that the flightcrew is able to silence an erroneous overspeed or stall aural warning, accomplish the following:

Modification of Air Data Computer System

(a) Within 24 months after the effective date of this AD, modify the air data computer system, as specified in paragraph (a)(1), (a)(2), or (a)(3) of this AD, as applicable.

(1) For Model 747–400, –400D, and –400F series airplanes: Re-route wires associated with air data computer (ADC) overspeed warnings, replace the P1–1 and P3–1 module assemblies in the flight deck with improved module assemblies, install various wires in and between the flight deck and main equipment center of the airplane, and perform a test of the source select module and a system functional test, according to Boeing Alert Service Bulletin 747–34A2460, Revision 2, dated June 14, 2001.

Note 1: Boeing Service Bulletin 747–34A2460, Revision 2, refers to Boeing Component Service Bulletins 233U2200–31–01 and 233U2205–31–01, both dated April 20, 1995, as additional sources for instructions to change the ADC computer source select switch on the P1–1 and P3–1 panels, respectively.

(2) For Model 757–200, –200PF, and –200CB series airplanes: Install a circuit breaker and replace an existing lightplate assembly with a new, improved lightplate assembly in the flight compartment; install two relays and remove a certain relay in the main equipment center; make various wiring changes in the flight compartment and main equipment center; and perform tests of the flight data acquisition unit, flight data recorder system, and stall and overspeed warnings. Do these actions according to Boeing Alert Service Bulletin 757–34A0222, dated March 28, 2002.

(3) For Model 767–200, –300, and –300F series airplanes: Install two circuit breakers in the flight deck, install two relays in the main equipment center, make various wiring changes in the flight deck and main equipment center, and do a system functional test, according to Boeing Alert Service Bulletin 767–34A0332, dated January 10, 2002.

Actions Required To Be Accomplished Prior to or Concurrently With Paragraph (a)

(b) Prior to or concurrently with accomplishment of paragraph (a) of this AD, accomplish paragraph (b)(1) or (b)(2) of this AD, as applicable.

(1) For Boeing Model 747–400, –400D, and –400F series airplanes: Do the actions specified in Table 2 of this AD, as applicable:

TABLE 2.—BOEING MODEL 747–400, –400D, AND –400F SERIES AIRPLANES—PRIOR/CONCURRENT ACTIONS

For airplanes listed in—	Accomplish all actions associated with—	According to the accomplishment instructions of—
Boeing Service Bulletin 747–31–2179, dated May 26, 1994.	Replacing the three Electronic Flight Information System (EFIS)/Engine Indicating and Crew Alerting System (EICAS) interface units (EIU) in the main equipment center with improved EIUs and installing new software in six integrated display units (IDU) and three EIUs.	Boeing Service Bulletin 747–31–2179.
Boeing Service Bulletin 747–31–2180, dated March 17, 1994.	Replacing the three EIUs in the main equipment center with improved EIUs and installing new software in six IDUs and three EIUs.	Boeing Service Bulletin 747–31–2180.
Boeing Service Bulletin 747–31–2217 dated May 19, 1994.	Installing new software in six IDUs and three EIUs ..	Boeing Service Bulletin 747–31–2217.
Boeing Service Bulletins 747–31–2217 and 747–31–2178; and dated July 1, 1993.	Replacing three EIUs with improved EIUs and installing new software in six IDUs and three EIUs.	Boeing Service Bulletin 747–31–2178.
Boeing Service Bulletins 747–31–2217 and 747–45–2010, dated December 17, 1992.	Installing new software in the central maintenance computer (CMC).	Boeing Service Bulletin 747–45–2010.
Boeing Service Bulletins 747–31–2217 and 747–45–2005, dated February 8, 1990.	Replacing certain CMCs with improved CMCs, modifying related wiring, and modifying the data loader control panel.	Boeing Service Bulletin 747–45–2005.
Boeing Service Bulletins 747–31–2217 and 747–31–2163, dated February 14, 1991.	Installing new software in six IDUs and three EIUs ..	Boeing Service Bulletin 747–31–2163.

Replacement of EICAS Computers

(2) For airplanes identified in any of the service bulletins listed in Table 3 of this AD: Prior to or concurrently with accomplishment of the actions required by paragraph (a) of this AD, accomplish all actions associated with replacing the existing EICAS computers with improved EICAS computers, according to the applicable service bulletin specified in Table 3 of this AD. The actions include performing an EICAS readout comparison to ensure that the applicable software is used; replacing the existing EICAS computers with new, improved EICAS computers that can be upgraded with certain software; and making related wiring changes. Table 3 of this AD follows:

TABLE 3.—SERVICE BULLETINS FOR REPLACEMENT OF EICAS COMPUTERS

Boeing Service Bulletin (all including Appendices A, B, and C)—	Service bulletin revision level—	Service bulletin date—
757–31–0059	Revision 3	March 29, 2001.
767–31–0091	Revision 3	April 27, 2000.
767–31–0098	Revision 2	October 21, 1999.
767–31–0099	Revision 3	February 8, 2001.
767–31–0100	Revision 2	July 29, 1999.
767–31–0101	Original	July 6, 2000.

Parts Installation

(c) As of the effective date of this AD, no person may install, on any airplane, a part having a part number listed in the ''Existing Part Number'' column of the table under paragraph 2.E. of Boeing Alert Service Bulletin 747–34A2460, Revision 2, dated June 14, 2000; 757–31–0059, Revision 3, dated March 29, 2001; 767–31–0091, Revision 3, dated April 27, 2000; 767–31–0098, Revision 2, dated October 21, 1999; 767–31–0099, Revision 3, dated February 8, 2001; 767–31–0100, Revision 2, dated July 29, 1999; or 767–31–0101, dated July 6, 2000; or under paragraph II.D. of Boeing Service Bulletins 747–31–2179, dated May 26, 1994; 747–31–2180, dated March 17, 1994; 747–31–2178, dated July 1, 1993; 747–45–2010, dated December 17, 1992; 747–45–2005, dated February 8, 1990; or 747–31–2163, dated February 14, 1991.

Operator's ''Equivalent Procedure'

(d) Where Boeing Service Bulletins 747–34A2460, Revision 2, dated June 14, 2000; and 757–34A0222, dated March 28, 2002; specify that certain actions may be accomplished per an operator's ''equivalent procedure': These actions must be accomplished per the chapter of the applicable Boeing 747 or 757 Airplane Maintenance Manual specified in the applicable service bulletin. An operator's ''equivalent procedure'' cannot be used unless the operator receives FAA approval for that procedure according to paragraph (e) of this AD.

Alternative Methods of Compliance

(e) In accordance with 14 CFR 39.19, the Manager, Seattle Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on July 11, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–18082 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15466; Airspace Docket No. 03–ASO–9]

Proposed Establishment of Class D and Class E4 Airspace; Ormond Beach, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish Class D and Class E4 airspace at Ormond Beach, FL. A Federal contract tower with a weather reporting system is being constructed a the Ormond Beach Municipal Airport. Therefore, the airport will meet the criteria for establishment of Class D and Class E4 airspace. Class D surface area airspace and Class E4 airspace designated at an extension to Class D airspace is required when the control tower is open to contain existing Standard Instrument Approach Procedures (SIAPs) and other Instrument Flight Rules (IFR) operations at the airport. This action would establish Class D airspace extending upward from the surface, to but not including 1,200 feet MSL, within a 3.2-mile radius of the Ormond Beach Municipal Airport and a Class E4 airspace extension that is 4.8 miles wide and extends 6.9 miles northwest of the airport.

DATES: Comments must be received on or before August 18, 2003.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2003–15466/ Airspace Docket No. 03–OSO–9, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337.

FOR FURTHER INFORMATION CONTACT: Walter R. Cochran, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2003–15466/Airspace Docket No. 03–ASO–9.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the

comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara.* Additionally, any person may obtain a copy of this notice by submitting a request to the Federally Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class D airspace and Class E4 airspace at Ormond Beach, FL. Class D airspace designations for airspace areas extending upward from the surface of the earth and Class E airspace designations for airspace areas designated as an extension to a Class D airspace are published in Paragraphs 5000 and 6004 respectively, of FAA Order 7400.9K, dated August 30, 2002, and effective September 16, 2002, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9K, Airspace Designations and Reporting Points, dated August 30, 2002, and effective September 16, 2002, is amended as follows:

Paragraph 5000 Class D Airspace

* * * * *

ASO FL D Ormond Beach, FL [NEW]

Ormond Beach Municipal Airport, FL
(Lat. 29°180′4″ N, long. 81°06′50″ W)

That airspace extending upward from the surface, to but not including 1,200 feet MSL within a 3.2—mile radius of Ormond Beach Municipal Airport; excluding that airspace within the Daytona Beach, FL Class C airspace area. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6004 Class E4 Airspace Areas Designated as an Extension to a Class D Airspace Area

* * * * *

ASO FL E4 Ormond Beach, FL [NEW]

Ormond Beach Municipal Airport, FL
(Lat. 29°18′04″ N, long. 81°06′50″ W)
Ormond Beach VORTAC
(Lat. 29°18′12″ N, long. 81°06′46″ W)

That airspace extending upward from the surface within 2.4 miles each side of the Ormond Beach VORTAC 342° radial, extending from the 3.2—mile radius to 6.9 miles northwest of the VORTAC. This Class E4 airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in College Park, Georgia, on July 7, 2003.

Walter R. Cochran,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 03–18074 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 125 and 135

Regulatory Review—Reopen of Comment Period

AGENCY: Federal Aviation Administration

ACTION: Notice and request for comments.

SUMMARY: By this notice, the Federal Aviation Administration (FAA) reopens the comment period for its regulatory review of 14 CFR parts 135 and 125. The part 135/125 Aviation Rulemaking Committee had its first meeting on June 10–12, 2003, and members requested that the comment period be reopened to accommodate additional public comments to the docket. The FAA agrees and by this notice reopens the comment period for Docket No. FAA–2003–13923 until November 18, 2003.

DATES: The FAA will consider all comments on this regulatory review filed on or before November 18, 2003. We will consider comments filed late if it is possible to do so without incurring expense or delay.

ADDRESSES: You may submit comments to FAA–2003–13923 by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251
- Mail: Docket Management Facility: U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 am and 5 pm, Monday through Friday, except Federal Holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the

online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, *see* the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please *see* the Privacy Act heading under **SUPPLEMENTARY INFORMATION** and Regulatory Notices.

FOR FURTHER INFORMATION CONTACT: Katherine Perfetti, AFS–200, 800 Independence Ave. SW., Washington, DC 20591 (202) 267–3760, facsimile at (202) 267-5229, or by e-mail: *Katherine.Perfetti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

By **Federal Register** notice of February 3, 2003 (68 FR 5488), the FAA announced a comprehensive regulatory review and rewrite of parts 135 and 125. It noted that issues under review may include:

a. Design and manufacture of new aircraft that current regulations do not address adequately (for example, large airships, powered lift aircraft).

b. Certain large airplanes with modifications to payload capacity and passenger seat configuration operating under part 91 or 135.

c. New equipment and technologies not adequately addressed in current regulations.

d. International harmonization, ICAO commercial standards, and increased international operations.

The FAA invited members of the public to serve on the Part 135/125 Aviation Rulemaking Committee and/or work groups by notifying the person listed in the notice before March 5, 2003. In addition, the notice solicited comments from the public to docket number FAA–2003–13923 to be filed on or before June 3, 2003.

The Part 125/135 Aviation Rulemaking Committee met on June 10–12, 2003, in Herndon, Virginia to review the docket and to assign the issues posted there to the various work groups. At the opening session of the meeting on June 10, some members requested that the docket be reopened for receiving additional public comments. The FAA agrees with the reopening of the docket and publishes this notice to advise the public of the extended opportunity to comment on or provide any issues pertinent to this review. The reopened comment period will close on November 18, 2003, because the third meeting of the committee is planned for November 19–21, 2003.

Public Participation

The FAA invites interested parties to submit specific, detailed written comments, or provide input on issues pertinent to parts 125 and 135. All comments submitted to the docket before November 18, 2003, will be considered in the committee discussions.

Privacy Act

Anyone is able to search the electronic form of all comments received into our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Statement in the **Federal Register** published on April 11, 2000 (volume 65, Number 70, pages 19477–78), or you may visit *http://dms.dot.gov.*

Public Web Site

The FAA also reminds the public that a public Web site, *http:www.l.faa.gov/avr/arm/part135/index.cfm* has been established to provide information on the committee and the review. As part of that website, the FAA provides a list of members of the committee who may be contacted for additional information on a specific area of the review and information on future meetings of the committee.

Issued in Washington, DC on July 9, 2003.

John M. Allen,

Acting Director, Flight Standards Service.

[FR Doc. 03–18070 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 348

[Docket No. 78N–0301]

RIN 0910–AA01

External Analgesic Drug Products for Over-the-Counter Human Use; Reopening of the Administrative Record and Amendment of Tentative Final Monograph

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is reopening the administrative record for the rulemaking for over-the-counter (OTC) external analgesic drug products to accept comments and data concerning OTC external analgesic drug products that have been filed with the Division of Dockets Management, FDA, since the administrative record officially closed. FDA is also amending the tentative final monograph (TFM) (proposed rule) to clarify the status of patch, plaster, and poultice dosage forms for OTC external analgesic drug products. FDA is providing for the administrative record to remain open for 90 days to allow for public comment on the comments and data being accepted into the rulemaking and on the status of patch, plaster, and poultice dosage forms for OTC external analgesic drug products. This action is part of FDA's ongoing review of OTC drug products.

DATES: Submit written or electronic comments and data by October 15, 2003. See section IX of this document for the effective date of any final rule that may be published based on this proposal.

ADDRESSES: Submit written comments and data to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments.*

FOR FURTHER INFORMATION CONTACT: Gerald M. Rachanow, Center for Drug Evaluation and Research (HFD–560), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–2307.

SUPPLEMENTARY INFORMATION:

I. Background

FDA has on numerous occasions received new data and information bearing on OTC drug panel reports and proposed monographs after the closing of the administrative record in a rulemaking proceeding. Under § 330.10(a)(7)(iii) (21 CFR 330.10(a)(7)(iii)), new data and information may be submitted within 12 months after publication of a TFM. Within 60 days after this 12-month period ends, comments on the new data and information may be submitted (see § 330.10(a)(7)(iv)). Under § 330.10(a)(10)(i), the administrative record closes at the end of this 60-day period.

In the **Federal Register** of February 8, 1983 (48 FR 5852), FDA published the TFM on OTC external analgesic drug products for OTC human use. The

administrative record for this TFM closed on April 9, 1984. The administrative record for this rulemaking was last reopened on November 19, 1997 (62 FR 61710) to include safety and effectiveness data on OTC vaginal douche drug product ingredients for external analgesic uses (e.g., povidone-iodine for the relief of minor vaginal itching and irritation) and closed on February 17, 1998. Under § 330.10(a)(7)(v), new data and information submitted after February 17, 1998, prior to the establishment of a final monograph (FM), are considered a petition to amend the monograph and are to be considered only after a FM has been published unless the agency finds that good cause has been shown that warrants earlier consideration. Further, under § 330.10(a)(10)(ii), FDA shall make all decisions and issue all orders under § 330.10 in the FM solely on the basis of the administrative record and shall not consider data or information not included as part of the administrative record.

FDA has received new data and information submitted to the external analgesic rulemaking after the administrative record closed on April 19, 1984. In some cases, interested persons submitted a petition to reopen the record. In other cases, they submitted new data and information to the Division of Dockets Management as comments on the TFM. A number of the petitions and comments submitted to the TFM contain new data on proposed nonmonograph (Category II and Category III) ingredients and on external analgesic active ingredients applied in a patch, plaster, or poultice dosage form.

II. Reopening of the Administrative Record

Because these data are relevant to the final classification of these ingredients in the FM, FDA has determined that good cause exists to consider these new data and information in developing the FM for these products. By this document, FDA announces that it is treating all of these submissions, received after the administrative record closed, as petitions to reopen the administrative record, and is granting the petitions by allowing the new data and information contained therein to be included in the administrative record for the rulemaking for OTC external analgesic drug products. Accordingly, the agency is reopening the administrative record for this rulemaking to accept data and information previously submitted to the Division of Dockets Management into the administrative record and to provide interested persons an opportunity to submit comments on these data and information prior to the closing of the record.

III. Status of Patch, Plaster, and Poultice Dosage Forms for OTC External Analgesic Drug Products

After the TFM was published on February 8, 1983, FDA received a petition (Ref. 1) to amend portions of the TFM to add poultice or plaster dosage forms only for the counterirritant ingredients in proposed § 348.12, specifically for the ingredients methyl salicylate; camphor; menthol; and capsicum. This petition led FDA to review the report of the Advisory Review Panel on OTC Topical Analgesic, Antirheumatic, Otic, Burn, and Sunburn Prevention and Treatment Drug Products (the Panel) (44 FR 69768, December 4, 1979), the TFM for OTC external analgesic drug products, available data, marketing history, and the current market for OTC counterirritant ingredients in topical drug products used in poultice and plaster dosage forms.

FDA found that the Panel discussed poultices and plasters only in its discussion of allyl isothiocyanate (oil of mustard) (44 FR 69768 at 69791 and 69792) and stated its concern that used as a poultice, the inflammatory action caused by allyl isothiocyanate may go beyond erythema to vesication. It was the Panel's opinion that although the actual number of adverse effects to external use of mustard preparations was relatively low, care should be taken to assure that safety is maintained through adequate packaging, labeling, and application. The low incidence of adverse reactions the Panel discussed (44 FR 69768 at 69791) was for an ointment dosage form (Ref. 2) and not for a plaster or poultice (a soft, moist mass about the consistency of cooked cereal, spread between layers of muslin, gauze, or towels and applied hot to a given area in order to create moist local heat or counterirritation). The Panel did briefly discuss mustard plaster, National Formulary IX , but did not include a plaster dosage form in its recommended dosage for this ingredient (44 FR 69768 at 69792).

The Panel did not discuss plaster or poultice dosage forms for any other counterirritants, although articles from standard texts in some of the submissions to the Panel indicated that capsicum has been used in a plaster dosage form (Ref. 3). There was one submission to the Panel for a medicated poultice dressing containing methyl salicylate, salicylic acid, and eucalyptus oil as active ingredients (Ref. 4). Although the Panel recommended a Category I classification for methyl salicylate, it did not discuss the submission related to the use of this ingredient as a poultice or plaster. The submission did not contain any controlled clinical evaluations to support safety and effectiveness of the combination drug product or for the specific contribution of the individual active ingredients. The product's safety and effectiveness were based on its performance for 80 years. At that time, FDA surveyed several standard texts that listed currently marketed topical drug products containing counterirritants and did not find any plaster or poultice dosage forms listed therein.

FDA stated (Ref. 5) that in order for poultice and plaster dosage forms to be generally recognized as safe and effective and to develop any additional labeling that may be needed for such dosage forms, it is necessary to obtain more information, specifically:

1. The safe and effective concentration of the drug ingredient(s), especially under the occlusion of a plaster.
2. Data on percutaneous absorption under occlusion.
3. The length of contact time that it is safe to leave the poultice or plaster on the skin; how often the plaster or poultice needs to be changed for effective use.
4. The frequency of application that is considered safe and effective.
5. Whether or not directions and a warning are necessary regarding checking the area at specified intervals for erythema to prevent blistering, and what time intervals are recommended.
6. The age groups for whom poultices and plasters are recommended for safe use.
7. Labeling of currently marketed products.

FDA's detailed comments are on file in the Division of Dockets Management (Ref. 5).

Since that time, FDA has received a number of submissions on external analgesic counterirritant active ingredients in a plaster dosage form (Refs. 6 through 31). The submissions have included protocols and data to establish safety and effectiveness of the plaster/patch dosage forms. FDA has commented on the protocols and data, but has not found the information sufficient to support the safety and effectiveness of these dosage forms (Refs. 32 through 44). Further, FDA is not aware of sufficient data to classify any OTC external analgesic active ingredient in a patch, plaster, or poultice dosage form as Category I. Accordingly, FDA is classifying all OTC

external analgesic ingredients in a patch, plaster, or poultice dosage form in Category III (more data needed). FDA is proposing to amend the introductory language in §§ 348.10 and 348.12 to include the following language at the end of the currently proposed language, to read as follows: ''The active ingredients of the product consist of any of the following, within the established concentration for each ingredient, but not for use in a patch, plaster, or poultice dosage form.'' FDA will revise this language if any of these active ingredients are found acceptable for use in one of these dosage forms.

IV. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Under the Regulatory Flexibility Act, if a rule has a significant economic impact on a substantial number of small entities, an agency must analyze regulatory options that would minimize any significant impact of the rule on small entities. Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement of anticipated costs and benefits before proposing any rule that may result in an expenditure in any one year by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation).

FDA believes that this proposed rule is consistent with the principles set out in Executive Order 12866 and in these two statutes. FDA has determined that the proposed rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order. As explained later in this section, FDA believes that the proposed rule, if finalized, will not have a significant economic impact on a substantial number of small entities. The Unfunded Mandates Reform Act does not require FDA to prepare a statement of costs and benefits for this proposed rule, because the proposed rule is not expected to result in any 1-year expenditure that would exceed $100 million adjusted for inflation. The current inflation adjusted statutory threshold is about $110 million.

The purpose of this proposed rule is to determine the monograph status of patch, plaster, and poultice dosage forms for external analgesic drug products for OTC human use. This proposed rule indicates that these dosage forms have not been determined to be generally recognized as safe and effective for any OTC external analgesic drug products at this time.

Manufacturers who wish to market these types of products for external analgesic active ingredients need to provide additional safety and effectiveness data to FDA before the FM for these products is established. If adequate safety and effectiveness data are not provided, FDA will not include these types of dosage forms for external analgesic active ingredients in the FM, to be published in a future issue of the **Federal Register**, and any currently marketed products will no longer be able to be marketed when the FM becomes effective, unless they are the subject of an approved new drug application.

FDA estimates that there is a limited number of OTC patch, plaster, and poultice external analgesic drug products currently in the marketplace. Reformulation will not be possible if these dosage forms are not included in the FM. Thus, manufacturers of these products may incur a loss of revenue. However, these manufacturers may be able to replace these products with other products that contain monograph ingredients in the dosage forms currently proposed for inclusion in the FM, e.g., creams, lotions, ointments. Manufacturers will not incur any costs related to proving safety and effectiveness of the active ingredients in these proposed monograph dosage forms. Based on the lack of adequate scientific information on external analgesic active ingredients in patch, plaster, and poultice dosage forms, FDA does not believe that there are any significant alternatives to the proposed rule that would adequately provide for the safe and effective use of these specific OTC drug products.

Under the Regulatory Flexibility Act, if a rule has a significant impact on a substantial number of small entities, an agency must analyze regulatory options that would minimize any significant impact of a rule on small entities. This proposed rule would exclude patch, plaster, and poultice dosage forms from the final monograph for OTC external analgesic drug products. A few entities that currently market these products may incur significant impacts if these products are not included in the final monograph. However, as only a limited number of small firms market these products in the dosage forms that may not be included in the FM, FDA does not believe that this proposed rule will impose a significant economic burden on affected entities. Thus, this economic analysis, together with other relevant sections of this document, serves as FDA's initial regulatory flexibility analysis, as required under the Regulatory Flexibility Act.

FDA invites public comment regarding any substantial or significant economic impact that this rulemaking would have on manufacturers who market these products. Comments regarding the impact of this rulemaking on such manufacturers should be accompanied by appropriate documentation. FDA is providing a period of 90 days from the date of publication of this proposed rulemaking in the **Federal Register** for comments to be developed and submitted. FDA will evaluate any comments and supporting data that are received and will reassess the economic impact of this rulemaking in the preamble to the final rule.

V. Paperwork Reduction Act of 1995

This proposed rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VI. Environmental Impact

The agency has determined under 21 CFR 25.31(a) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency tentatively concludes that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VIII. Request for Comments

FDA is reopening the administrative record for a period of 90 days for

comments, new data, and information to be submitted. Interested persons have already had an opportunity to submit comments, objections, or requests for an oral hearing on the TFM. Therefore, any comments at this time should only address the data and information submitted to the administrative record after April 9, 1984, and should specifically identify the data and information on which the comments are being provided. In addition, only new information related to the submissions being included in the administrative record at this time should be submitted. Any data and information previously submitted to this rulemaking need not be resubmitted. In establishing an FM, FDA will consider only comments, data, and information submitted prior to the closing of the administrative record following this current reopening.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments to *http://www.fda.gov/dockets/ecomments* or three paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IX. Proposed Effective Date

FDA is proposing that any final rule that may issue based on this proposal become effective 12 months after its date of publication in the **Federal Register**.

X. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) under Docket No. 78N–0301 and may be see by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Comment No. CP6.
2. OTC vol. 060051.
3. OTC vol. 060033.
4. OTC vol. 060052.
5. Comment No. LET39.
6. Comment No. C109.
7. Comment No. CP8.
8. Comment No. SUP8.
9. Comment No. LET46.
10. Comment No. RPT4.
11. Comment No. LET51.
12. Comment No. C111.
13. Comment No. LET57.
14. Comment No. LET66.
15. Comment No. PR1.
16. Comment No. PR2.
17. Comment No. CR9.
18. Comment No. CP13.
19. Comment No. C116.
20. Comment No. PR3.
21. Comment No. LET71.
22. Letter from M. Rapaport to D. Bowen, FDA, dated May 1, 1997.
23. Letter from M. Rapaport to L. Katz and S. Aurecchia, FDA, dated May 28, 1997.
24. Telefax from J. L. Boren, Argus Research, Inc., to M. Rapaport, dated June 17, 1997.
25. Letter from M. Rapaport to S. Aurecchia, FDA, dated June 23, 1997.
26. Letter from M. Rapaport to L. Katz and S. Aurecchia, FDA, dated July 1, 1997.
27. Comment No. LET84.
28. Letter from M. Rapaport to E. Yuan, FDA, dated April 1, 2000.
29. Comment No. SUP9.
30. Comment No. SUP10.
31. Comment No. SUP11.
32. Comment No. LET49.
33. Comment No. LET50.
34. Comment No. LET55.
35. Comment No. LET61.
36. Comment No. MM9.
37. Comment No. LET67.
38. Comment No. LET68.
39. Comment No. LET69.
40. Comment No. LET70.
41. Comment No. PDN2.
42. Comment No. LET85.
43. Comment No. MM10.
44. Comment No. LET86.

List of Subjects in 21 CFR Part 348

Labeling, Over-the-counter drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 348 (as proposed in the **Federal Register** of February 8, 1983 (48 FR 5852)) be amended as follows:

PART 348—EXTERNAL ANALGESIC DRUG PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

1. The authority citation for 21 CFR part 348 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 371.

2. Section 348.10 is amended by revising the introductory text to read as follows:

§ 348.10 Analgesic, anesthetic, and antipruritic active ingredients.

The active ingredients of the product consist of any of the following, within the established concentration for each ingredient, but not for use in a patch, plaster, or poultice dosage form:

* * * * *

3. Section 348.12 is amended by revising the introductory text to read as follows:

§ 348.12 Counterirritant active ingredients.

The active ingredients of the product consist of any of the following, within the established concentration for each ingredient, but not for use in a patch, plaster, or poultice dosage form:

* * * * *

Dated: July 7, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–17934 Filed 7–16–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR–4867–N–01]

Manufactured Housing Consensus Committee—Rejection of Land Use Proposal

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of Rejection of Manufactured Housing Consensus Committee Recommendation of Proposed Regulation.

SUMMARY: The Secretary has rejected a proposed recommendation by the Manufactured Housing Consensus Committee to promulgate a regulation concerning restrictions on the use of land for the placement of manufactured housing. The Secretary has determined that the Department has no legal authority to promulgate such a regulation under the National Manufactured Housing Construction and Safety Standards Act of 1974.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Administrator, Manufactured Housing Program, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000; telephone (202) 708–6401 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Manufactured Housing Consensus Committee has transmitted to the Secretary a recommendation dated March 14, 2003, that the Manufactured Housing Home Procedural and Enforcement Regulations, 24 CFR part 3282, be amended to include the following statement:

''No state or local jurisdiction shall allow a landowner to place restrictions

on their [sic] land prohibiting homes built to the federal manufactured home construction and safety standards when the landowner allows other forms of single-family residential construction.''

I. Background: Applicable Statutory Provisions.

Consensus Committee. The Consensus Committee was established by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5401 *et seq.* (''the Act'') for the purpose of providing periodic recommendations to the Secretary to adopt, revise, and interpret the federal manufactured housing construction and safety standards and the procedural and enforcement regulations. 42 U.S.C. 5403(a)(3)(A). It may submit to the Secretary proposed procedural and enforcement regulations and recommendations for the revision of the regulations. 42 U.S.C. 5403(b)(1).

Within 120 days from the date on which the Secretary receives a proposed procedural or enforcement regulation from the Consensus Committee, the Secretary must approve or reject the proposal. If he rejects the proposal, he must provide to the Consensus Committee a written explanation of the reasons for rejection and publish in the **Federal Register** the rejected proposal and the reasons for the rejection. 42 U.S.C. 5403(b)(4).

Preemption. It appears that the legal underpinning of the Consensus Committee's recommendation is the preemption provision of the Act, 42 U.S.C. 5403(d). The preemption provision allows federal construction and safety standards promulgated under the Act to preempt state and local laws. *See* ''Notice of Staff Guidance, 62 FR 3456 (1997);'' ''Statement of Policy'', 62 FR 24337 (1997). The provision states that Federal construction and safety standards promulgated under the Act preempt state and local laws to the extent that such are applicable to the same aspect of performance of a manufactured home and are not identical to Federal construction and safety standards. 42 U.S.C. 5403(d).

Congress amended the preemption provision in 2000 to provide that preemption ''shall be broadly and liberally construed to ensure that disparate state or local requirements or standards do not affect the uniformity and comprehensiveness of the [Federal construction and safety] standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this title [the Act].'' 42 U.S.C. 5403(d).

This amendment to the Act provided explicit statutory support for paragraph (d) of HUD's regulation at 24 CFR 3282.11 that implements the preemption authority. Paragraph (d) states: ''No State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.''

The U.S. Court of Appeals for the 11th Circuit had raised a concern as to whether this paragraph was valid, stating that section 3282.11(d) ''seems to expand the scope of the unambiguous preemption provision enacted by Congress.'' *Georgia Manufactured Housing* v. *Spalding County,* 148 F.3d 1304, n8 (11th Cir. 1998).

The amendment expressed Congress' intent that the preemption over local construction standards should be construed so as to recognize the nationwide scope of the Federal manufactured housing program and the manufactured housing industry.

The amendment did not modify the basic substance of the statutory preemption provision. By its specific terms, the provision apply to construction and safety standards, generally codified in 24 CFR part 3280. It does not apply to other regulations, including the Manufactured Home Procedural and Enforcement Regulations in 24 CFR part 3282.

The 2000 Congressional amendments also revised the Purpose of the Act to include, ''to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans'', 42 U.S.C. 5401(b)(2). The amendment cannot be found to expand the applicability of the preemption provision beyond the federal construction and safety standards. There is no indication of congressional intent to preempt local land use or zoning laws. *Accord, Burton* v. *City of Alexander City,* 2001 U.S. Dist. LEXIS 6651, M.D. Ala. 2001. (''* * * Congress plainly did not intend to preempt zoning laws that operate only where HUD does not. The most that can be said about the 2000 Act is that it removed any possible ambiguity created by a cryptic footnote in *Spalding County* * * * *See* 148 F.3d 1309 n.8.'').

Authority of the Secretary and the Administrative Procedure Act. All regulations promulgated by the Department must be consistent with a statutory grant of authority. Generally, with respect to the manufactured housing program that authority would be found in a specific authority such as in the Act or in some general authority such as that found in Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d). All regulations must also comply with the procedural and substantive requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq*. Under the APA, federal regulations will be held unlawful and set aside if found to be ''in excess of statutory jurisdiction, authority, or limitations, or shore of statutory right * * *'' 5 U.S.C. 706(2).

Decision of the Secretary

The Secretary rejects the proposed recommendation of the Consensus Committee. The Secretary need not publish the proposal or his reasons for rejection for the following reasons. Nevertheless, since the proposal is the first recommendation issued by the Consensus Committee, the Secretary is publishing the proposal and his reasons for rejection in order to explain the statutory limitations on the Consensus Committee's authority and the Secretary's obligations under the Act.

Bases for Rejection. 1. The Act gives no specific jurisdiction or authority to the Consensus Committee to proposed procedural or enforcement regulations that have no relationship to the revision or enforcement of the federal construction and safety standards. As such, the proposed regulation is beyond the authority granted by the Act to the Consensus Committee to propose and is beyond the scope of what the Secretary is required to respond to under the procedures established in the Act.

The jurisdiction of the Consensus Committee is limited by the provisions of the Act. The Consensus Committee may make recommendations to adopt, revise, or interpret the procedural and enforcement regulations. The Consensus Committee does not have authority under the Act to make recommendations concerning the Procedural and Enforcement Regulations that are beyond the scope of the regulations.

The scope of 24 CFR 3282.1(b), the Procedural and Enforcement Regulations, is to prescribe procedures for the implementation of the Secretary's responsibilities under the Act to conduct inspections and investigations necessary to enforce the federal construction and safety standards, to determine that a manufactured home fails to comply

with an applicable standard or contains an imminent safety hazard, and to direct manufacturers to notify owners, and to remedy violations of the federal construction and safety standards and, in some cases, to remedy the defect or imminent safety hazard.

The proposal is a mandate upon local jurisdiction to prohibit landowners from restricting the use of their land. The use of real property, or private or contractual restrictions upon it, is not within the scope of the Secretary's authority under the Act or within the applicability of the procedural and enforcement regulations.

2. Regardless of the authority given to the Consensus Committee under the Act to propose regulations, it proposal would seek the expand the authority of the Department beyond a reasonable interpretation of any provisions in the Act.

The Department may not expand its jurisdiction of the limitations of its statutory powers through statutory interpretation. The Department's statutory jurisdiction and authority must be delegated to it by Congress and be found within an authorizing provision of a statute. 5 U.S.C. 706(2).

The proposal is not based upon the federal construction and safety standards or the enforcement of those federal standards. It seeks to establish mandates on state and local jurisdictions, and to expand responsibilities and authority beyond what Congress had granted by requiring HUD to become involved in state and local land use issues and to take remedial action against local governments if they do not comply. There is no congressional authorization in the Act permitting or mandating the Department to be involved in such issues. As such, any actions by the Secretary to promulgate the proposal would be held unlawful under the APA.

HUD has long interpreted its authority under the Act to exclude involvement in local land use issues. 62 FR 3456, 3458 (1997). It had not previously interpreted the preemption provisions in the Act to preempt local laws unless the local laws involved building or construction standards. There is nothing in the Act or in the legislative history of the Act that would suggest a directive by Congress to change HUD's long-held legal position.

In addition, there is no applicable authority under any other statutory grant of power of the Secretary. The action requested by the Consensus Committee is not within any general authority of the Secretary, such as it granted in Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

For HUD to promulgate and enforce a regulation of such massive impact upon individual landowners and local jurisdictions nationwide and to assert federal involvement in areas traditionally reserved to the states, the Department would need a more specific statement from Congress of its intent.

3. The proposed regulation does not delineate a procedure by which state or local jurisdictions are to ascertain or to prohibit restrictions on land use nor a procedure by which the Department is to enforce against a state or local jurisdiction that does not comply. While the proposal purports to create a mandate, the regulation is only one sentence and does not contain any structure by which to enforce it or to ascertain violations. As such, the regulation is administratively incomplete.

Accordingly, for these reasons, the Secretary rejects the proposed regulation of the Consensus Committee.

Dated: July 11, 2003.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 03–18175 Filed 7–15–03; 10:08 am]

BILLING CODE 4210–27–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–144908–02]

RIN 1545–BB66

Federal Unemployment Tax Deposits—De Minimis Threshold

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the deposit of Federal Unemployment Tax Act (FUTA) taxes. The proposed regulations would provide an additional exception to the FUTA deposit requirements for taxpayers that qualify for the *de minimis* exception to the deposit requirements applicable to Federal Insurance Contribution Act (FICA) and withheld income taxes. The regulations affect small employers required to make deposits of FUTA taxes.

DATES: Written or electronically generated comments and requests for a public hearing must be received by October 15, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–144908–02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:RU (REG–144908–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site at *http://www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Heather L. Dostaler, (202) 622–4940; concerning submissions of comments and requests for a public hearing, Treena Garrett of the Regulations Unit at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The current rules relating to the deposit of FUTA taxes require employers to deposit taxes on a quarterly basis. The only generally applicable exception to this requirement is for employers whose accumulated FUTA taxes (*i.e.*, FUTA taxes for the current quarter plus undeposited FUTA taxes for prior quarters) do not exceed $100. These employers are not subject to the deposit requirements until the quarter in which accumulated FUTA taxes exceed $100. Similarly, if FUTA tax liability for a calendar year exceeds deposits for the year, the employer may remit the balance with the annual return only if it does not exceed $100. In all other cases, the balance must be deposited with an authorized financial institution.

An employer is also generally required to deposit FICA taxes and withheld income taxes (employment taxes) on at least a monthly basis and file a quarterly or annual employment tax return. For any return period in which the employer's total liability for these taxes is less than $2,500, the employer may satisfy its deposit obligation by remitting the tax with a timely filed employment tax return. An employer that qualifies for this exception with respect to employment taxes accumulated during a return period may, nevertheless, be required to deposit FUTA taxes for that period if the amount of accumulated FUTA taxes exceeds $100.

Explanation of Provisions

The proposed regulations would provide an additional exception to the FUTA deposit requirements for

employers that are permitted to satisfy their obligation to deposit employment taxes by remitting the taxes with the employment tax return (*de minimis* depositors). Thus, an employer will not be required to deposit FUTA taxes for a quarter if the amount of the employer's accumulated FICA taxes and withheld income taxes for the quarter is less than $2,500 and those taxes are remitted with the employer's timely filed employment tax return for the quarter. The employer will remain subject to the FUTA deposit requirements and will be required to deposit accumulated FUTA taxes for any quarter in which the amount of accumulated FICA taxes and withheld income taxes is at least $2,500 and the amount of accumulated FUTA taxes exceeds $100. The proposed regulations would also permit an employer that is a *de minimis* depositor for the last calendar quarter of a year to remit the balance of its FUTA tax liability for the year with a timely filed return. These additional exemptions from the FUTA deposit requirements will lessen burdens on small business owners, especially those employing part-time or seasonal workers.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) and electronic comments that are submitted timely to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Heather L. Dostaler of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division).

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

1. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

2. In § 31.6302(c)–3, paragraphs (a)(2) and (a)(3) are revised to read as follows:

§ 31.6302(c)–3 Use of Government depositaries in connection with tax under the Federal Unemployment Tax Act.

(a) * * *

(2) *Special rules*—(i) *De minimis rule for deposit of taxes attributable to payments made after December 31, 2003.* The provisions of paragraph (a)(1) of this section do not apply to a period described therein if the period ends after December 31, 2003, and the taxpayer is a *de minimis* depositor of employment taxes as defined in § 31.6302–1(e) (Federal Insurance Contributions Act (FICA) taxes and withheld income taxes) for such period. A taxpayer is a *de minimis* depositor of employment taxes for a period described in paragraph (a)(1) of this section if—

(A) The period is a single calendar quarter and, under the *de minimis* rule of § 31.6302–1(f)(4), the taxpayer is permitted to satisfy its obligation to deposit employment taxes accumulated during the quarter by remitting the taxes with a timely filed return; or

(B) The period includes two or more calendar quarters and, under the *de minimis* rule of § 31.6302–1(f)(4), the taxpayer is permitted to satisfy its obligation to deposit employment taxes accumulated during the last quarter in the period by remitting the taxes with a timely filed return.

(ii) *Special rule where accumulated amount does not exceed $100.* The provisions of paragraph (a)(1) of this section do not apply with respect to a period described therein if the amount of the tax imposed by section 3301 for the period as computed under the provisions of section 6157 plus amounts not deposited for prior periods in the same calendar year does not exceed $100. Thus, an employer is not required to make a deposit for a period unless the tax for the period plus tax not deposited for prior periods exceeds $100.

(iii) The provisions of this paragraph (a)(2) are illustrated by the following examples. In the examples, A's FUTA tax rate, after the credit for contributions to state unemployment funds, is assumed to be 0.8 percent. The examples are as follows:

Example 1. In 2004, Employer A makes quarterly returns of employment taxes. In the first quarter, A's only employees are part-time workers B and C, who are each paid an annual salary of $15,000 in semi-monthly installments. Both B and C claim single filing status with one exemption on Form W–4 and each is paid $3,750 during the first quarter. The employees' share of FICA tax for the quarter is $573.75 (.0765 × ($3,750 + $3,750)), A's matching FICA tax is also $573.75, and Federal income tax withheld from B and C is $518. Thus, the amount of accumulated employment taxes for the quarter ($1,665.50) is less than $2,500 and, under the *de minimis* rule of § 31.6302–1(f)(4), A is permitted to satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. A's FUTA tax liability for the first quarter is $60 (.008 × ($3,750 + $3,750)). Because A is a *de minimis* depositor under paragraph (a)(2)(i) of this section and A's FUTA tax liability does not exceed $100, both of the exceptions in this paragraph (a)(2) apply and A is not required to deposit FUTA taxes for the first calendar quarter.

Example 2. On April 16, 2004, A hires part-time worker D, who is also paid an annual salary of $15,000 in semi-monthly installments and who also claims single filing status with one exemption on Form W–4. During the second quarter, B and C are each paid $3,750 and D is paid $3,125. The employees' share of FICA tax for the quarter is $812.81 (.0765 × ($3,750 + $3,750 + $3,125)), A's matching FICA tax is also $812.81, and Federal income tax withheld from B, C, and D is $734. Again, the amount of accumulated employment taxes for the quarter ($2,359.62) is less than $2,500 and, under the *de minimis* rule of § 31.6302–1(f)(4), A is permitted to satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. The FUTA tax applies only to the first $7,000 that each employee is paid during the calendar year. Thus, for both B and C, amounts paid in the second quarter are subject to the FUTA tax only to the extent they do not exceed $3,250 (the $7,000 annual limit less first quarter wages of $3,750). A's FUTA tax liability for the second quarter is $77 (.008 × ($3,250 +

$3,250 + $3125)) and A has an accumulated FUTA tax liability in the amount of $137. Accordingly, the exception in paragraph (a)(2)(ii) of this section does not apply. A is, however, a *de minimis* depositor under paragraph (a)(2)(i) of this section and is, therefore, not required to deposit FUTA taxes for the second calendar quarter.

Example 3. On June 30, 2002, B and C quit employment with A. The following day, A hires E, a full-time employee who is paid an annual salary of $40,000 in semi-monthly installments and who also claims single filing status with one exemption on Form W–4. During the third quarter, D is paid $3,750 and E is paid $10,000. The employees' share of FICA tax for the quarter is $1,051.88 (.0765 × ($3,750 + $10,000)), A's matching FICA tax is also $1,051.88, and Federal income tax withheld from D and E is $1,609. The *de minimis* rule of § 31.6302–1(f)(4) does not apply because the amount of accumulated employment taxes for the quarter ($3,712.76) is not less than $2,500 and A may not satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. All amounts paid to D in the third quarter are subject to the FUTA tax because the total amount paid to D through the end of the quarter does not exceed the $7,000 annual limit. The tax also applies to the first $7,000 paid to E. A's FUTA tax liability for the third quarter is $86 (.008 × ($3,750 + $7,000)) and A has an accumulated FUTA tax liability of $223. Because A is not a *de minimis* depositor under paragraph (a)(2)(i) of this section and A's accumulated FUTA tax liability exceeds $100, neither of the exceptions in this paragraph (a)(2) apply and A is required to deposit the accumulated FUTA tax liability on or before October 31, 2004.

(3) *Requirement for deposit in lieu of payment with return.* If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 2003, exceeds by more than $100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year and the employer does not qualify as a *de minimis* depositor under paragraph (a)(2)(i) of this section during the last quarter of the calendar year, the employer shall, on or before the last day of the first calendar month following the calendar year for which the return is required to be filed, deposit the balance of the tax due with an authorized financial institution. If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 2003, does not exceed by more than $100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year or if the employer qualifies as a *de minimis* depositor under paragraph (a)(2)(i) of this section during the last quarter of the calendar year, the employer may, on or before the last day of the first calendar month following the calendar year for which the return is required to be filed, remit the balance of the tax at the time and place fixed for filing the return.

* * * * *

Robert E. Wenzel,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 03–18042 Filed 7–16–03; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD07–03–072]

RIN 1625–AA09

Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Boca Grande, Charlotte County, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the operating regulations and the name of the Gasparilla Island Causeway bridge, across the Gulf Intracoastal Waterway, mile 34.3, in Boca Grande, Florida. The proposed rule would require the bridge to open only two times an hour during the weekdays and four times an hour during certain times on the weekends and Federal holidays. This change would improve the flow of vehicular traffic while not significantly impacting navigation.

DATES: Comments and related material must reach the Coast Guard on or before September 15, 2003.

ADDRESSES: You may mail comments and related material to Commander (obr), Seventh Coast Guard District, 909 SE. 1st Ave, Room 432, Miami, Florida, 33131. Comments and material received from the public, as well as documents indicated in the preamble as being available in the docket, will become part of this docket and are available for inspection or copying at Commander (obr), Seventh Coast Guard District, 909 SE. 1st Avenue, Room 432, Miami, Florida, 33131, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Barry Dragon, Seventh Coast Guard District, Bridge Branch, 909 SE. 1st Ave Miami, Florida, 33131, telephone number 305–415–6743.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD07–03–072], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. However, you may submit a request for a meeting by writing to Bridge Branch, Seventh Coast Guard District, 909 SE. 1st Ave, Room 432, Miami, Florida, 33131, explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Gasparilla Island Causeway bridge across the Gulf Intracoastal Waterway, mile 34.3, is a swingbridge with a vertical clearance of 9 feet at mean high water and a horizontal clearance of 81 feet. The current operating regulations published in 33 CFR 117.287(a–1), require the bridge to open on signal; except that, from January 1 to May 31, from 7 a.m. to 5 p.m., the bridge need open only on the hour, quarter hour, half hour and three quarter hour. The bridge owner requested a change to the bridge operating schedule so that the bridge must open on signal, except that from 7 a.m. to 6 p.m., Monday through Friday, except Federal holidays, the bridge need open only on the hour and half hour, and, from 7 a.m. to 6 p.m. on weekends and Federal holidays, the bridge need open only on the hour, quarter hour, half hour and three quarter hour. This regulatory proposal would ease vehicular traffic congestion while providing for the reasonable needs of navigation. The bridge currently opens less than two times per hour on both weekdays and weekends.

In addition, the owner requested that the name of the bridge be changed to the Boca Grande Swingbridge, as it is known locally. The local name is more

descriptive of the bridge's swingbridge design.

Discussion of Proposed Rule

The proposed rule would require the bridge to open on signal, except that, from 7 a.m. to 6 p.m., Monday through Friday, except Federal holidays, the bridge need open only on the hour and half hour, and from 7 a.m. to 6 p.m. on weekends and Federal holidays, the bridge need open only on the hour, quarter hour, half hour and three quarter hour. This proposed rule would also change the name of the bridge to the Boca Grande Swingbridge.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary because the proposed rule provides for regular openings that will accommodate the reasonable needs of navigation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities because the proposed rule allows for regular bridge openings and would meet the reasonable needs of navigation.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with Federal regulations, to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Although this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the

Instruction from further environmental documentation. Under figure 2–1, paragraph (32)(e), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 117

Bridges

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); Section 117.255 also issued under authority of Pub. L. 102–587, 106 Stat. 5039.

2. Section 117.287 (a–1) is revised to read as follows:

§ 117.287 Gulf Intracoastal Waterway.

* * * * *

(a–1) The draw of the Boca Grande Swingbridge, mile 34.3, shall open on signal; except that, from 7 a.m. to 6 p.m., Monday through Friday, except Federal holidays, the draw need open only on the hour and half hour. On Saturday, Sunday and Federal holidays from 7 a.m. to 6 p.m., the draw need open only on the hour, quarter hour, half hour and three quarter hour.

* * * * *

Dated: July 3, 2003.

Harvey Johnson Jr.,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 03–18136 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 03–109; FCC 03–120]

Lifeline and Link-Up Programs

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on the *Recommended Decision,* of the Federal-State Joint Board on Universal Service (Joint Board) regarding modifications to the Lifeline and Link-Up programs. The Commission seeks comment regarding the Joint Board's recommendations.

DATES: Comments are due on or before August 18, 2003. Reply comments are due on or before September 2 , 2003.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. *See* **SUPPLEMENTARY INFORMATION** for filing instructions.

FOR FURTHER INFORMATION CONTACT: Shannon Lipp, Attorney, Telecommunications Access Policy, Wireline Competition Bureau, (202) 418–7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in WC Docket No. 03–109, FCC 03–120, released on June 9, 2003. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

I. Introduction

1. In this Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on the *Recommended Decision* of the Federal-State Joint Board on Universal Service (Joint Board) regarding modifications to the Lifeline and Link-Up programs. In its *Recommended Decision,* the Joint Board recommended that the Commission expand the default federal eligibility criteria to include an income-based criterion and additional means-tested programs. In addition, the Joint Board recommended that the Commission require states, under certain circumstances, to adopt verification procedures. Finally, to more effectively target low-income consumers, the Joint Board recommended that the Commission provide outreach guidelines for the Lifeline/Link-Up program.

2. The Commission notes that the Joint Board recommended that the Commission specifically seek comment on several issues. In particular, the Joint Board recommended that the Commission seek more information about the reasons for differences in low-income penetration rates over time and among states. The Joint Board recommended that the Commission adopt a voluntary information collection from the states regarding their Lifeline/Link-Up programs, and seek comment on the survey's format and questions. The Joint Board also recommended that the Commission seek comment on whether it would be possible to modify the Link-Up program to directly address barriers posed by outstanding unpaid balances for local and long distance services. In addition, the Joint Board recommended that the Commission obtain more information about how an appeals process for the termination of Lifeline benefits could work and whether 60 days was an appropriate time period for a consumer to appeal. Finally, the Joint Board recommended that the Commission seek comment on whether states could adopt verification of continued Lifeline eligibility procedures within one year. The Commission encourages commenters to address these issues in their comments.

3. In addition, the Commission seeks comment on several minor changes to clarify and streamline our rules. Section 52.33(a)(1)(i)(C) of the Commission's rules states that ''Lifeline Assistance Program customers shall not receive the monthly number-portability charge.'' However, this rule is not referenced in § 54.401 of the Commission's rules where Lifeline is defined. The Commission proposes to add paragraph (e) to § 54.401 to clarify that Lifeline customers are exempt from the monthly number-portability charge, cross-referencing § 52.33(a)(1)(i)(C). Additionally, in the *First Report and Order,* 62 FR 32862, June 17, 1997, the Commission adopted the Joint Board's recommendation to prohibit service deposit requirements for customers who accept toll limitation. Currently, § 54.401(c) states that, ''[e]ligible telecommunications carriers may not collect a service deposit in order to initiate Lifeline service, if the qualifying low-income consumer voluntarily elects toll blocking from the carrier, where available. If toll blocking is unavailable, the carrier may charge a service deposit.'' The Commission proposes to amend this section by replacing ''toll blocking'' with ''toll limitation'' to make this rule consistent with the *First Report and Order.* Finally, subpart G of part 36 of our rules, Lifeline Connection Assistance Expense Allocation, states that ''[t]his subpart shall be effective through December 31, 1997. On January 1, 1998, Lifeline Connection Assistance shall be provided in accordance with part 54, subpart E of this chapter.'' Because § § 36.701 through 36.741 contained in this subpart are no longer effective, the Commission proposes to remove this subpart from our rules.

II. Procedural Issues

A. Ex Parte Presentations

4. This is a permit but disclose rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, as

long as they are disclosed as provided in the Commission's rules.

B. Initial Paperwork Reduction Act Analysis

5. This NPRM may modify an information collection. As part of a continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due at the same time as other comments on this Notice; OMB comments are due August 18, 2003. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Initial Regulatory Flexibility Analysis

6. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided below in section I.D. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for and Objectives of the Proposed Rules

7. On December 21, 2000, the Commission requested the Joint Board to review the Lifeline/Link-Up program for all low-income consumers. The Joint Board subsequently released a public notice seeking comment on the Lifeline/Link-Up program. On April 2, 2003, the Joint Board released its recommendations regarding modifications to the Lifeline/Link-Up program. This NPRM seeks comment on the Joint Board's recommendations.

8. Since its inception, the Lifeline/Link-Up program has provided support for telephone service to millions of low-income consumers. Despite this success, the Commission believes that the program can be further improved. For example, expanding the current federal default eligibility criteria to add an income-based criterion of 135% of the Federal Poverty Guidelines (FPG) and additional means-tested programs would allow the Lifeline/Link-Up program to adapt to the changes resulting from ''The Personal Responsibility and Work Opportunity Reconciliation Act'' (PROWRA) and would otherwise address issues associated with receiving public assistance. Permitting eligibility based solely on income responds to concerns that PROWRA has caused decreased enrollment in welfare assistance programs. Participants in means-tested programs must meet income-based eligibility criteria that vary by program. Requiring participation in such programs or utilizing income-based criteria ensures that only low-income consumers are eligible for Lifeline/Link-Up support.

9. Adding certification for income-based eligibility and verification requirements for program and income-based eligibility would ensure that only eligible low-income individuals receive benefits, thereby preventing fraud and abuse. Adopting outreach guidelines would facilitate the marketing of the Lifeline/Link-Up program to eligible individuals and increase telephone subscribership among low-income households. Finally, issuing a survey form would enable the Commission to gather data and information from states regarding the administration of Lifeline/Link-Up programs. The Commission believes that these proposed modifications to the Lifeline/Link-Up program may increase Lifeline/Link-Up subscription rates and make phone service affordable to more low-income individuals and families.

2. Legal Basis

10. The legal basis as proposed for this NPRM is contained in sections 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 4(i), 4(j), 201–205, 214, 254, 403.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

12. The Commission's decision to adopt certification and verification requirements, and its use of a voluntary survey, would apply to service providers that provide services to qualifying low-income consumers who receive Lifeline/Link-Up support. According to the Universal Service Administrative Company's (USAC) 2002 Annual Report, only local exchange carriers, cellular/personal communications services (PCS) providers, and competitive access providers would be subject to these requirements. Because many of these service providers could include small entities, the Commission expects that the proposal in this proceeding could have a significant economic impact on local exchange carriers, small incumbent local exchange carriers, cellular/PCS providers, and competitive access providers that are small entities.

13. *Small Incumbent Local Exchange Carriers.* The Commission has included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is on that, *inter alia,* meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope. The Commission has therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *Local Exchange Carriers, Small Incumbent Local Exchange Carriers, Competitive Access Providers.* Neither the Commission nor the SBA has developed a size standard specifically for small providers of local exchange services. The closest applicable size standard under the SBA rules is for wired telecommunications carriers. This

provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the most recent Commission data there are 1,619 local services providers with 1,500 or fewer employees. Because it seems certain that some of these carriers are not independently owned and operated, the Commission is unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's size standard. Of the 1,619 local service providers, 1,024 are incumbent local exchange carriers, 411 are Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), 131 are resellers and 53 are other local exchange carriers. Consequently, the Commission estimate that no more than 1,619 providers of local exchange service are small entities may be affected.

15. *Cellular and Other Wireless Telecommunications.* The SBA has developed a small business size standard for Cellular and Other Wireless Telecommunications, which consists of all such firms having 1,500 or fewer employees. According to data for 1997, a total of 977 such firms operated for the entire year. Of those, 965 firms employed 999 or fewer persons for the year, and 12 firms employed 1,000 or more. Therefore, nearly all such firms were small businesses. In addition, the Commission notes that there are 1,807 cellular licenses; however, a cellular licensee may own several licenses. According to Commission data, 858 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio telephony service, which are placed together in the data. We have estimated that 291 of these are small under the SBA small business size standard.

16. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequencies designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA. No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, the Commission concludes that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, plus the 48 winning bidders in the re-auction, for a total of 231 small entity PCS providers as defined by the SBA and the Commission's auction rules. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as small or very small businesses.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

17. Currently, carriers that receive Lifeline/Link-Up support are required to submit FCC Form 497 on a quarterly basis for each month. Regardless of any rule changes, carriers will continue to be required to submit this form to USAC. Should the Commission decide to adopt the Joint Board's recommendation to require states to implement and carriers to perform certification and verification procedures, the associated rule changes could require carriers to retain additional records to document compliance with performing certification and verification of a consumer's eligibility. Without more certainty about which options the Commission will or will not adopt as rules, we cannot accurately estimate the cost of compliance by small carriers, including whether FCC Form 497 will require carriers to provide more information in response to new rule changes. In this NPRM, the Commission therefore seeks comment on the types of burdens carriers will face in retaining records documenting certification and verification compliance, and in submitting reports to USAC. The Commission also seeks comment on whether the costs of such recordkeeping and reporting are outweighed by the potential benefits of the possible reforms. Entities, especially small businesses, are encouraged to quantify, if possible, the costs and benefits of the reporting and recordkeeping requirement proposals, if possible.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

18. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

19. The NPRM seeks comment on how to reduce the administrative burden and cost of compliance for small telecommunications service providers. The Commission has accepted the statutory requirement that an alternative be considered when necessary to protect the interests of small entities. We particularly seek comment from contributors that are ''small business concerns'' under the Small Business Act on the following proposals contained in the *Recommended Decision.*

20. The Commission seeks comment, for example, on the Joint Board's recommendation that the Commission require carriers to notify consumers of their impending termination of Lifeline benefits when the carrier initiates termination of a consumer's Lifeline benefits. The consumer could have up to 60 days to appeal to their carrier before Lifeline support is discontinued. The Commission seeks further comment on how such an appeals process would work, balancing the needs of Lifeline recipients with the administrative burden that an appeals process may impose on carriers. Without such an appeals process, consumers may have difficulty maintaining telephone service if the consumer's financial situation temporarily fluctuates. Telephone service is necessary for finding and keeping a job, thus assisting the consumer in his/her climb out of poverty into the working world.

21. To reduce the administrative burden on states to adopt certification and verification procedures, the Joint Board compiled an appendix of state certification and verification procedures to provide guidance to other states seeking to adapt those procedures to their state Lifeline/Link-Up programs. Although these requirements may impose an additional burden on carriers required to perform the certification and

verification, the Joint Board believes that these requirements prevent fraud and abuse, maintain the integrity of the Lifeline universal service support mechanism, and are necessary to help control costs.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

22. None.

D. Comment Filing Procedures

23. The Commission invites comment on the issues and questions set forth in the Notice of Proposed Rulemaking and Initial Regulatory Flexibility Analysis contained herein. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before August 18, 2003. Reply comments are due on or before September 2, 2003. All filings should refer to WC Docket No. 03–109. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

24. Comments filed through ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, which in this instance is WC Docket No. 03–109. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message: get form <your e-mail address>. A sample form and directions will be sent in reply.

25. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Parties who choose to file by paper are hereby notified that effective December 18, 2001, the Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, NE., Suite 110, Washington, DC, 20002. The filing hours at this location will be 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD, 20743. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD, 20743. This location will be open 8 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street SW., Washington, DC 20554. The USPS mail addressed to the Commission's headquarters actually goes to our Capitol Heights facility for screening prior to delivery at the Commission.

If you are sending this type of document or using this delivery method—	It should be addressed for delivery to—
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002 (8 a.m. to 7 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail).	9300 East Hampton Drive, Capitol Heights, MD 20743 (8 a.m. to 5:30 p.m.)
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12th Street SW., Washington, DC 20554

All filings must be sent to the Commission's Secretary: Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street SW., Suite TW–A325, Washington, DC, 20554.

26. Parties who choose to file by paper should also submit their comments on diskette to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–B540, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, WC Docket No. 03–109), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554.

27. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC, 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW., Washington, DC, 20554. In addition, the full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

28. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules. We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage parties to track the organization set forth in the NPRM in

order to facilitate our internal review process.

E. Further Information

29. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0531 (voice), 202–418–7365 (tty).

30. For further information, contact Shannon Lipp at (202) 418–7400 or Diane Law Hsu at (202) 418–7400 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

III. Ordering Clauses

31. Pursuant to the authority contained in sections 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, this Notice of Proposed Rulemaking is adopted.

32. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 54

Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–18056 Filed 7–16–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 99–87; RM–9332; FCC 03–34]

Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended and Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Federal Communications Commission (FCC) provides public notice that it is considering adopting new rules related to promoting spectrum efficiency for private land mobile radio services (PLMRS), and is seeking public comment. The FCC seeks comment on whether existing equipment certification requirements are sufficient to promote migration to one voice path per 6.25 kHz bandwidth or equivalent technology, or whether migration to 6.25 kHz bandwidth or equivalent technology should be mandatory. The FCC seeks comment on its tentative conclusion that in order to facilitate migration to 6.25 kHz technology, it should take regulatory actions similar to the ones it has taken to facilitate the migration to 12.5 kHz technology. The FCC also seeks comment on the date(s) by which licensees would be required to migrate to 6.25 kHz technology and to have taken any other related compliance actions, in the event a new requirement were adopted mandating migration to 6.25 kHz. The FCC seeks public comment in an effort to fully understand the issues associated with a migration to 6.25 kHz technology and, within the same context, to fully understand what, if anything can be learned from its experience of establishing regulatory requirements to secure migration to 12.5 kHz technology. The FCC intends to develop a comprehensive record on issues and concerns surrounding migration to 6.25 kHz technology.

DATES: Comments on or before September 15, 2003, and reply comments on or before October 15, 2003.

ADDRESSES: Federal Communications Commission 445 12th Street, SW., Washington, DC 20554, *See* **SUPPLEMENTARY INFORMATION** for filing instructions.

FOR FURTHER INFORMATION CONTACT: Karen Franklin, Esq. Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, at (202) 418–0680, TTY (202) 418–7233, or via e-mail at *kfrankli@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the FCC's FNPRM, FCC 03–34, adopted on February 25, 2003, and released on February 12, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Jenifer Simpson at (202) 418–0008, TTY (202) 418–2555.

1. Earlier in the same docket, the FCC, sought comments on, inter alia, certain proposals to promote new spectrum-efficient technology. This FNPRM seeks comment on additional issues related to promoting spectrum efficiency for the PLMRS. In addition, the FNPRM seeks comment on whether the equipment certification provision in the current rules is sufficient to promote migration to one voice path per 6.25 kHz bandwidth or equivalent technology, or whether migration to 6.25 kHz bandwidth or equivalent technology should be mandatory.

Procedural Matters

A. Regulatory Flexibility Act Analyses

2. As required by the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. 604, the FCC has prepared an Initial Regulatory Flexibility Analysis concerning the impact of the policies and rules addressed by the *FNRRM.* The Initial Regulatory Flexibility Analysis is set forth further. The FCC's Consumer Information Bureau, Reference Information Center, will send a copy of the *FNPRM,* including the Initial Regulatory Flexibility Act Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Paperwork Reduction Act of 1995 Analysis

3. This document does not contain any new or modified information collection. Therefore, it is not subject to the requirements for a paperwork reduction analysis, and we have not performed one.

C. Filing Procedures

4. Pursuant to sections 1.415 and 1.419 of the FCC's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before September 15, 2003, and reply comments on or before October 15, 2003. Comments may be filed using the FCC's Electronic Comment Filing System (''ECFS'') or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 13 FCC Rcd 11322, 11326 (1998).

5. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full

name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

6. Parties choosing to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. All filings must be sent to the FCC's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, The Portals, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition, courtesy copies should be delivered to Karen Franklin, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Room #4–C405, Washington, DC 20554.

7. All relevant and timely comments will be considered by the FCC before final action is taken in this proceeding. Comments and reply comments will be available for public inspection and duplication during regular business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. Copies also may be obtained from Qualex International., 445 12th Street, SW., Room CY–B400, Washington, DC 20554, (202) 863–2893.

Initial Regulatory Flexibility Analysis

8. As required by the Regulatory Flexibility Act (''RFA''), the FCC has prepared this present Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules proposed in the *FNPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided above in paras. 30–33, *supra.* The FCC will send a copy of the *FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (''SBA''). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

9. The purpose of this FNPRM is to determine whether it would be in the public interest, convenience, and necessity to amend our rules governing PLMR licensees in the 150–174 MHz and 421–512 MHz bands in order to expedite the transition to 6.25 kHz narrowband technology. While the FCC sought comment regarding issues associated with a migration to 12.5 kHz technology earlier in this same docket, the FCC did not at that time seek comment regarding issues associated with a migration to 6.25 kHz technology.

B. Legal Basis

10. Authority for issuance of this *FNPRM* is contained in sections 4(i), 303(r), and 332(a)(2) of the Communications Act of 1934, as amended.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. The RFA generally defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 1992, there were approximately 275,801 small organizations.

12. The proposed rule amendments may affect users of public safety radio services and private radio licensees that are regulated under part 90 of the FCC's rules, and may also affect manufacturers of radio equipment. An analysis of the number of small entities affected follows.

13. *Public Safety radio services and Governmental entities.* Public safety radio services include police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services. The SBA rules contain a definition for small radiotelephone (wireless) companies, which encompasses business entities engaged in radiotelephone communications employing no more that 1,500 persons. There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the FCC estimates that 81,600 (96 percent) are small entities.

14. *Estimates for PLMR Licensees.* Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the FCC has not developed a definition of small entities specifically applicable to PLMR users, nor has the SBA developed any such definition. The SBA rules do, however, contain a definition for small radiotelephone (wireless) companies. Included in this definition are business entities engaged in radiotelephone communications employing no more that 1,500 persons. Entities engaged in telegraph and other message communications with no more than $5 million in annual receipts also qualify as small business concerns. According to the Bureau of the Census, only twelve radiotelephone firms of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The FCC's fiscal year 1994 annual report indicates that, at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz.

15. *Equipment Manufacturers.* The FCC anticipates that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the SBA's regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and

television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

16. Possible requirements under consideration in this FNPRM would impose use of new narrowband technology at least one voice path per 6.25 kHz of spectrum by a date certain. Assuming the rules adopted earlier in the same docket in another context are a good model for the transition to 6.25 kHz narrowband technology (which assumption has yet to be established), the FCC might require licensees to convert to 6.25 kHz operation by a date certain; and/or establish dates after which equipment capable of operating at a higher bandwidth could no longer be certified, manufactured or imported; or freeze the filing of new applications for 12.5 kHz operation. These steps may be necessary to facilitate efficient management and use of spectrum.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.

18. The objective in the *Reframing* proceeding was to provide a means to transition licensees to 6.25 kHz technology, *see* para. 27, *supra.* Migration to 12.5 kHz technology was viewed as a stepping stone to operation at 6.25 kHz technology, *see id.* However, requiring the use of 6.25 kHz technology by a date certain could have an impact some small entities by requiring them to upgrade their communications systems before they would otherwise do so. An alternative would be to maintain the current rules, which are intended to foster migration to narrowband technology by way of progressively more stringent type certification requirements. The FCC issues this FNPRM in order to consider whether a change in its rules would benefit small entities and other PLMR licensees.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

19. None.

Ordering Clauses

20. Accordingly, pursuant to sections 1, 2, 4(i), 5(c), 7(a), 11(b), 301, 302, 303, 307, 308, 309(j) , 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 155(c), 157(a), 161(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351, the Balanced Budget Act of 1997, Public Law Number 105–33, Title III, 111 Stat. 251 (1997), and §§ 1.421 and 1.425 of the FCC's rules, 47 CFR 1.421 and 1.425, it is ordered that the *Second Further Notice of Proposed Rule Making* is hereby adopted.

21. It is furthered ordered that notice is hereby given of the proposed regulatory changes contained in the *Second Further Notice of Proposed Rule Making,* and that comment is sought on these proposals.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–18055 Filed 7–16–03; 8:45 am]

BILLING CODE 6712–01–U

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 390 and 391

[Docket No. FMCSA–97–2277]

RIN 2126–AA17

Safety Performance History of New Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM); request for comments.

SUMMARY: In March 1996, the Federal Motor Carrier Safety Administration's predecessor, the Federal Highway Administration (FHWA), published a notice of proposed rulemaking (NPRM) specifying what minimum safety performance history information new or prospective employers would be required to seek concerning commercial motor vehicle (CMV) drivers and from where that information should be obtained. This SNPRM: Addresses issues raised in response to the NPRM, including small business burden, and incorporates new requirements of limitation on liability and driver privacy protections imposed by the Transportation Equity Act for the 21st Century (TEA–21).

DATES: FMCSA must receive your comments by September 2, 2003.

ADDRESSES: You may submit comments to DOT DMS Docket Number FMCSA–97–2277 by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401,Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
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FOR FURTHER INFORMATION CONTACT: Mr. David Goettee, (202) 366–4097, FMCSA, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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Background

Section 391.23 of Title 49 of the Code of Federal Regulations (CFR), Investigations and Inquiries, sets forth a motor carrier's responsibility to check the driving record and investigate the employment history of a new driver. The section directs the motor carrier to investigate information about the employment history from a driver's previous employers during the last three years. It does not specify what type of information must be investigated. The driver's driving records are to be obtained from each State in which the driver held a motor vehicle operator's license or permit during the preceding three years. These inquiries and investigations must be completed within 30 days of hiring the new employee. Currently, there is no specification of what information must be investigated, or a requirement for a current or previous employer to respond to such investigations. Consequently, many former employers refuse to respond to employment investigations, while others—for fear of litigation—merely verify that the driver worked for the carrier and provide the driver's dates of employment.

The Hazardous Materials Transportation Authorization Act of 1994 was signed into law on August 26, 1994 (Pub. L. 103–311, 108 Stat. 1677) (HazMat Act), partly codified at 49 U.S.C. 5101–5127. Section 114 of the HazMat Act directed the Secretary of Transportation to amend § 391.23 to specify minimum safety information to be investigated from previous employers when performing employment record investigations on driver candidates and newly hired drivers. A copy of section 114 of the HazMat Act is included in the docket as document 37. Section 114 specified that a motor carrier must investigate a driver's 3-year accident record, and drug and alcohol history, from employers the driver worked for within the previous three years. Current or previous employers must be required to respond to the investigating employer within thirty days of receiving the investigation request.

The agency published the NPRM for implementing regulations in the **Federal Register** on March 14, 1996 (61 FR 10548). A copy of the NPRM is in docket FMCSA–1997–2277.

Summary of NPRM

The March 14, 1996, NPRM proposed changes to 49 CFR part 391 (Qualification of Drivers), with proposed conforming amendments to parts 382 (Controlled Substances and Alcohol Use and Testing), 383 (Commercial Driver's License Standards; Requirements and Penalties), and 390 (Federal Motor Carrier Safety Regulations; General). The agency proposed under § 391.23 that motor carriers investigate the following minimum safety information from the previous 3-year period from all employers who employed the driver during that time: (1) Hours-of-service violations that resulted in an out-of-service order, (2) accidents as defined under § 390.5, (3) failure to undertake or complete a rehabilitation program recommended by a substances abuse professional (SAP) under § 382.605, and (4) any ''misuse'' of alcohol or use of a controlled substance by the driver after he/she had completed a § 382.605 SAP referral. The existing § 391.23(b) requirement to obtain a driver's driving record(s) from the State(s) would be retained. To harmonize § 391.23(e) with then current drug and alcohol regulations under § 382.413, the agency also proposed the motor carrier obtain the driver's written authorization to investigate the required drug and alcohol information.

Current and former employers would be required to respond to an investigating employer within 30 days of receiving an investigation request. The investigating motor carrier would have to afford the driver a reasonable opportunity to review and comment on any information obtained during the employment investigation, and would have to inform the driver of this right at the time of application for employment. Conforming changes were also proposed to §§ 383.35(f) and 391.21(d) to reinforce the driver notification requirement.

Further, the agency proposed under § 390.15 to change the required retention period for the accident register maintained by motor carriers from one year to three years, and to begin requiring motor carriers to provide information from the accident register in response to all prospective employer investigations pursuant to § 391.23. These provisions would facilitate the proposal requiring investigation of accident information by prospective employers by expanding a source of accident data that was already being collected and maintained by motor carriers for other purposes.

When the NPRM was published in 1996, the agency drug and alcohol regulations codified at 49 CFR part 382 required employers to investigate: (1) Alcohol tests with a result of 0.04 or greater alcohol concentration, (2) verified positive controlled substances test results, and (3) refusals to be tested. Section 382.413(a)(2) allowed a previous employer to pass along drug and alcohol test information received from other previous employers (as long as the information covered actions occurring within the previous two-year period). Under § 382.413(b), if an employer found that it was not feasible to obtain the drug and alcohol information prior to the first time a driver performed a safety-sensitive function for the employer, that employer could continue to use the driver in a safety sensitive function for up to 14 calendar days. After that time period, the employer could not use the driver in a safety-sensitive function unless the requisite information was obtained, or the employer had made a good faith effort to obtain it.

In its 1996 NPRM, the agency also proposed numerous conforming amendments to expand the type of drug and alcohol information that should be sought under § 382.413(a). Employers would be required to investigate whether, in the past 3 years, a driver had: (1) Violated the prohibitions in subpart B of part 382, or the alcohol or controlled substances rules of other DOT agencies; and (2) failed to undertake or complete a SAP's rehabilitation referral pursuant to § 382.605, or the alcohol or controlled substances rules of another DOT agency. Beyond incorporating the HazMat Act requirements into part 382, the violations enumerated in § 382.413 would also have been included in the alcohol and controlled substances regulations of ''all DOT agencies.'' At that time, FHWA believed that some drivers might apply for positions that require driving a CMV after having violated the alcohol or drug use prohibitions of another DOT agency. Therefore, the agency included a requirement for an employer to investigate information from all past employers for which a driver had worked in a position covered by the alcohol and/or drug prohibitions and testing requirements of another DOT

agency. That could have helped to ensure that persons applying for positions that require operating a CMV would have all of their relevant records of violations investigated. It would also have ensured that a SAP evaluated persons who test positive, and that violators completed a recommended rehabilitation program before returning to perform safety-sensitive functions.

The § 382.413(a)(2) requirement to pass along drug and alcohol information received from other previous employers when responding to an employer's investigation under § 382.413 was subsequently incorporated into the FMCSRs as a technical amendment in a final rule published in the **Federal Register** on March 8, 1996, (61 FR 9546). However, because § 382.413(a)(2) constituted a substantive change which should be subject to public notice and comment before becoming a final rule, the agency also included it in the March 14, 1996 NPRM.

In a related change proposed under § 382.405, disclosure of the information pursuant to § 382.413(a) would have required the driver's written authorization, and responding employers would have been required to reply within 30 days of receiving the investigation request.

Under proposed § 382.413(b), the agency would have extended the time period allowed to use a driver in a safety-sensitive function without having received the requisite drug and alcohol information from 14 days to 30 days. After 30 days, the employer would have been prohibited from continuing to use the driver to perform safety sensitive functions without having received, or having documented a good faith effort to obtain, the driver's drug and alcohol history.

Discussion of Comments to the NPRM

Small Business Administration Concerns

The Small Business Administration (SBA) believes that a substantial number of small entities would be economically impacted by the NPRM, and offered recommendations for minimizing such impacts. In particular, the SBA recommended FMCSA give more attention to the intent of the HazMat Act requirements relative to the Regulatory Flexibility Act certification regarding impacts on small entities, and specifically include estimates of the number and size of entities and the estimated costs they would incur. The SBA also requested that more extensive information be included about the estimated paperwork burden.

FMCSA Response: The FMCSA agrees that more extensive attention to regulatory flexibility is appropriate, and has included a more detailed Regulatory Flexibility Act analysis as part of this SNPRM. The agency has also prepared an initial regulatory evaluation and placed a copy of the regulatory evaluation in the docket for this rulemaking as document number 38. A summary of the regulatory evaluation is provided in this SNPRM under the section entitled ''Regulatory Evaluation: Summary of Benefits and Costs.'' FMCSA addresses SBA recommendations for major issues under the following topical discussions.

Employer Liability and Driver Rights

Many comments to the NPRM concerned issues of (1) employer liability for using investigative driver history background information in the hiring decision, (2) employer liability for furnishing the driver history background performance records, and (3) drivers' rights to review and comment on the accuracy this safety performance information and to processes for drivers to seek revision or provision for rebuttal. Seventeen commenters addressed the employer liability issues. Eighteen addressed the drivers' rights issue.

The American Trucking Associations (ATA) wrote:

> ''The potential liability arising from providing information about a former employee to a prospective employer continues to be a matter of the greatest concern to motor carriers. It has been a major factor inhibiting the effectiveness of the present provisions of § 391.23(c) for the past quarter-century. The general view, based on experience, is that a mere requirement for notification to drivers set forth in proposed § 383.35(f) and 391.21(d), or as currently required in § 391.21, is totally inadequate. We are also concerned with the present provisions and proposed amendments to § 382.413 because a driver-applicant is not specifically advised of the regulatory requirements that the prospective employer obtain the information and the obligation of the previous employer to provide it. * * * Even if the carrier successfully defends its action in providing factual information to the prospective employer, it will have almost surely been put to considerable needless expense to defend itself.''

A few commenters feared that providing the driver with full access to information received during the employment history investigation, and not just that proposed in the NPRM under § 391.23(c)(1), would increase the threat of litigation for employers, particularly if that information was the basis for denying the driver employment.

Several commenters proposed various remedies. The Regular Common Carrier Conference (RCCC) and Interstate Truckload Carriers Conference (ITCC) suggested the proposed driver's written release required for alcohol and controlled substances information under § 391.23(c)(1)(iii) and (iv) be required for all investigative information under § 391.23(c)(1). The RCCC believes this modification would greatly reduce the potential liability for unlawfully disclosing investigative information, and ensure that drivers know beforehand their safety performance records will be investigated from prior employers.

In supplemental comments to the docket, the ITCC noted that legislative relief was their preferred option for dealing with employer liability issues. The ITCC further believes the driver's signed release would provide an appropriate measure of protection for employers named as defendants in employment litigation. It pointed out that many employers have already incorporated some sort of release language into the printed employment application. Drivers subscribe to the release when signing the application.

The ITCC further proposed that the agency incorporate language into the final rule stating that the act of applying for employment denotes a driver's implied consent to the release of all information that carriers are required to obtain to make a considered employment decision. The inclusion of such ''implied consent'' language could be especially useful in satisfying the concerns of carriers accepting applications using non-written means, such as drivers calling 800 numbers provided by the carrier for recruiting new drivers. The ATA and DAC Services, Inc. also recommended including implied consent language in the final rule. The United Motorcoach Association (UMA) supports employer protection for releasing driver investigative information by adding a ''hold harmless'' clause to the final rule.

In the March 14, 1996, NPRM the agency requested specific comments on whether to define a ''reasonable opportunity'' for a driver to review and comment on safety performance records and whether this driver right should have time restrictions.

The Advocates for Highway and Auto Safety (AHAS) urged the agency to define ''reasonable opportunity'' rather than leave implementation of this proposal to the motor carrier industry.

Pinnacle Transport Services (Pinnacle) encouraged the agency to entirely eliminate the proposed right for the driver to review the furnished

information, as well as the corresponding stipulation under the proposed § 383.35(f) and § 391.21(d) that employers notify driver applicants of this right. Pinnacle believed that ''(u)ntil the Department of Labor makes this suggestion generally applicable to all employers, you are unreasonably forcing companies to become clearinghouses for minutiae.''

Some commenters suggested drivers be allowed to review the furnished investigative information only if they made a written request.

Dart Transit Company and Fleetline, Inc. recommended that only drivers who have been denied employment or a contract, in whole or in part, based on the furnished safety performance background information, be allowed to review and comment. They also suggested these drivers be given up to 30 days after notification of disposition of the application to provide written comments to the investigating carrier. In addition, they suggested a corresponding requirement that the prospective motor carrier advise all driver-candidates of their rights to request an opportunity to review and comment on the background data that is received.

Six commenters recommended all drivers be allowed to review and comment on only the safety items originally proposed under § 391.23(c)(1). Contract Freighters, Inc. suggested that only accident information be open to a driver's review and comment.

Several commenters recommended specific time frames for the driver applicant review and comment period. These range from within 3 workdays to 10, 30 or 60 days after receipt of notification of disposition of the application, commencement of the application process, or receipt of the investigation reports from the responding employer.

The United Motorcoach Association (UMA) proposed requiring employers to complete an employment record within 48 hours of an employee leaving, unless hindered by extenuating circumstances or authorized by a mutually agreed upon extension of that period. That employment record would be the one transmitted to subsequent employers investigating a prospective driver. The UMA also proposed drivers be granted the right to add brief personal and enlightening comments to the previous employer's report and that the combined record be forwarded to investigating employers upon request.

The International Brotherhood of Teamsters proposed a similar requirement, but favored allowing the employer 10 days in which to provide separated employees with his or her complete employment record. The employee would similarly be entitled to file supplemental comments.

FMCSA Response: On June 9, 1998, the President signed TEA–21. Section 4014 of the Act addresses this rulemaking by preempting State and local liability laws and regulations, thus limiting employer liability for investigating, furnishing and using previous employer driver safety performance records as part of the hiring decision (*i.e.,* the proposed driver safety performance history information enumerated under § 391.23(d) and (e) of this SNPRM), when carried out in accordance with FMCSA rules. A copy of section 4014 of TEA–21 is included in the docket as document 39. Section 4014 further directs the FMCSA to amend the Safety Performance History of New Drivers NPRM to specify details of protection for driver privacy, including establishing procedures whereby drivers may review, correct, or rebut investigative information received by a prospective motor carrier employer from a previous employer. FMCSA believes these procedures replace the phrase ''reasonable opportunity'' and fully address the concerns expressed above from AHAS.

Section 4014(a) amends 49 U.S.C. chapter 5, by adding section 508, preempting the right of anyone to bring action against employers rightfully fulfilling their requirement to investigate, provide and use specified previous employer driver safety performance history of driver-applicants as part of the hiring decision.

After implementation of these liability limitation provisions proposed in this SNPRM, no one would be allowed to bring actions or proceedings against a motor carrier requesting, providing and using this information in conformance with the procedures put forth in this SNPRM. This limitation would only apply if in accordance with FMCSA regulations the prospective employer has conducted the required investigations for driver safety performance information, the previous employers provided the required information to the investigating motor carrier, the previous employer is not found to have provided false information, and these processes were carried out in compliance with the proposed regulations. The proposed regulations would require observing the driver's right to review, correct or rebut the previous employer furnished records, and the requirement at 49 CFR 391.23(f) of this SNPRM to first obtain the driver's written authorization to release his/her drug and alcohol information.

As a result of the limitation on liability being granted, FMCSA believes the concerns of those who wanted to restrict drivers' rights to review previous employer investigative data to only safety items are fully addressed. FMCSA believes the drivers' right to review, comment, or rebut applies to all investigative information provided to prospective employers and used as part of the hiring decision process.

In addition, the method proposed in this SNPRM to further provide protection for driver privacy for drug and alcohol information is modeled on that already operational in the DOT drug and alcohol regulations under 49 CFR part 40, which meet the intent of section 114 of the HazMat Act. Although results of DOT-mandated drug and alcohol tests were determined not to be medical records, DOT policy treats the release of such results similar to the release of medical records.

Thus, the applicant would continue to be required to sign a written authorization for the specific employer (or agent) to provide investigative information about the applicant's drug and alcohol history to the prospective employer specified on the authorization. Any use of the information by the prospective employer for other than hiring purposes, such as release to anyone not involved in the hiring process, would be permitted only in accordance with the terms of the driver's authorization.

Various third party consumer reporting agencies sell services to the truck and bus industry for obtaining and providing a variety of information, including inquiries for State driving records and investigations for employer history pertaining to CMV drivers. A similar function under the DOT alcohol and controlled substance regulations is referred to by the term ''Service Agent.'' Such agents are prohibited by 49 CFR 40.321 from releasing a driver's personal alcohol and controlled substance information without the driver's written consent for that specific release.

The DOT Office of the Secretary, Office of Drug and Alcohol Policy and Compliance interprets the restriction on releasing information to mean that such third party service agents are prohibited from disclosing even that a driver's alcohol and controlled substance information exists in the service agent's files without the driver's written consent. The proposals in this SNPRM for provision of alcohol and controlled substances information contain this same restriction on release of this information by previous employers or

their agents operating under the limited liability provisions contained in this SNPRM.

The method proposed in this SNPRM to ensure the driver's right to review, correct, or rebut contains two major parts. First, as part of the application process prospective employers are required to notify driver applicants in writing of their review rights. Second, the furnishing previous employer is required to work with the driver to either revise the report, or allow the driver to have his/her rebuttal appended to the carrier report.

This process is generally modeled after provisions in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*) as it applies to motor carriers obtaining investigative information as part of the hiring decision process. Prospective employers would be authorized to investigate, and previous employers would be required to provide, non-drug and alcohol safety performance history information without a signed authorization from a prospective employee. Prospective employers would be required to provide the driver a copy of the information received if the driver submits a written request to the carrier to review the information (electronic or Internet requests would be acceptable).

In the interest of allowing drivers prompt access to the information critical to their hiring, the FMCSA proposes two business days for the prospective employer to provide a copy of the investigative data received upon receipt of a written request from the driver to review the information. If the driver chooses to correct or add a rebuttal to a previous employer's information, it is proposed that the previous employer have up to thirty calendar days to respond to the driver's request for such changes or incorporation of the rebuttal.

Comments are requested on the appropriateness of the number of days proposed for employer responses in this SNPRM. For example, should the prospective employer have more business days, such as five, or 10, to provide the driver with copies of the investigative data received? Should the previous employer be required to respond earlier than 30 calendar days, such as 10 or 15 business days, since the driver may not be receiving compensation pending resolution of adverse information provided by the previous employer?

The liability limitation protections under 49 U.S.C 508(a) only apply to motor carrier employers carrying out these investigations and other parties functioning as the agent for a previous or prospective employer. Companies functioning as a consumer-reporting agency providing reports from their repository of driver safety performance information, rather than as the agent for a specific motor carrier, are not granted the liability limitation proposed in this SNPRM. Instead they are subject to protections specified in the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq*. In addition, the protections under TEA–21 would not apply to motor carriers found to have knowingly provided false information. The previous or current employer's response should be based on fact and not opinion or hearsay.

Title 49 U.S.C. section 508 requires that the § 391.23(c) safety performance history information be accessible only to authorized persons involved in the hiring decision process and the motor carrier's insurance company. Under current regulations, motor carriers maintain information received in response to § 391.23(c) investigations in the Driver Qualification (DQ) file, along with various other types of information required by the FMCSRs. These include information related to the § 391.25 driving record annual review, and the § 391.41(a) bi-annual review of a driver's medical qualifications. The multiple functions of the DQ file increases the potential that motor carrier personnel other than those involved in hiring decisions would repeatedly have access to a driver's background employment records.

However, sections 114(b)(2) and (3) of the HazMat Act specify that drug and alcohol information are part of the minimum safety performance information to be sought under § 391.23(c). Therefore, that information is included in the information specified under section 4014 of TEA–21 as being restricted to limited accessibility, and only used for the hiring decision.

DOT regulated employers are already required by § 40.25(i) and § 382.401(a) to maintain drug and alcohol records confidentially in a secure location with controlled access. As a result, the industry has already developed procedures for complying with the recordkeeping requirements of parts 40 and 382. It is accepted practice to maintain drug and alcohol records separately from the DQ file in order for the employer to ensure that the data is adequately secured, and access to it is controlled in compliance with parts 40 and 382 recordkeeping requirements. Those persons with access to the drug and alcohol records are specifically designated and charged with keeping the data secure, and their access is controlled to ensure this is not compromised.

Therefore, the established recordkeeping practices for drug and alcohol records fulfill the requirements of section 4014 of TEA–21 for all previous employer investigative information. Accordingly, this SNPRM proposes under § 391.53 to require that all investigative information received from previous employers pursuant to § 391.23(c) be kept in the controlled, access-secured file. FMCSA believes that this meets the accessibility requirements necessary for employers being granted the limited liability specified in section 4014 of TEA–21.

Therefore, this proposal would revise § 391.23(c) to require that investigative information received be maintained as specified at § 391.53. Current instructions in § 391.51(b)(2) for retaining information relating to the § 391.23(c) investigations in the driver qualification file would be removed. The restriction contained in 49 U.S.C. 508(b)(1)(C) that investigative information received from previous employers can only be used for the hiring decision means the accident data received cannot be considered in the annual reviews of the driver's driving record required by § 391.25.

Section 4014 of TEA–21, codified at 49 U.S.C. 508 requires the Secretary to develop regulations implementing liability limitations on motor carriers requesting and providing investigative driver safety performance history information, and that those include procedures for prospective drivers to review, comment or rebut the information provided to prospective motor carriers. This SNPRM has modeled driver rights to review, comment or rebut driver safety performance on those contained in the Fair Credit Reporting Act for investigative information.

This SNPRM provides notification at § 391.23(i) of the right of the driver to request access to information provided to the prospective motor carrier employer, and at § 391.23(j) for the driver and the previous motor carrier to resolve any differences. FMCSA requests comments on the sufficiency of these procedures, and specific, proposed methods to improve them.

Hours of Service Violations Resulting in an Out-of-Service Order

SBA recommends FMCSA eliminate its proposal that motor carriers investigate information about a driver's hours-of-service violations that resulted in an out-of-service order. SBA does not believe the agency has adequately explained how the information would contribute to safety. It points out that section 114 of the Hazmat Act does not require information about a driver's hours-of-service violations, and the

FMCSRs do not require former employers to record or retain such information. Similarly, other commenters, including J.B. Hunt and Mobile Corporation, saw little or no relationship to safety performance.

FMCSA Response: The regulatory evaluation for this proposed rule reveals a strong and positive relationship between: (1) Hours-of-service violations that result in out-of-service orders, and (2) future safety performance. However, FMCSA has decided to eliminate the proposal for the following reasons: (1) Section 114 of the HazMat Act does not specifically require this information, (2) information about hours-of-service violations that resulted in out-of-service orders would be difficult for prospective employers to obtain from previous employers, because this information is only systematically reported to FMCSA as part of the Motor Carrier Safety Assistance Program (MCSAP) enforcement activities of the States, (3) requiring this information collection and establishing a motor carrier recording requirement would be particularly burdensome to small entities, and (4) comments to the docket opposed the proposal.

Drug and Alcohol Reporting

SBA believes the NPRM would result in an increased number of inquiries for drug and alcohol information under § 382.413, and that the 30-day response time would place new burdens upon small entities. SBA believes opinion and hearsay should be discouraged to minimize liability and circulation of false information.

To decrease the potential reporting burden and ensure that only fact-based information would be provided, SBA recommends the agency specify what information must be sought under § 382.413. The SBA further believes it would be difficult for employers to report the drug and alcohol violations and rehabilitation referrals of other DOT agencies, as proposed under § 382.413(a)(1). The SBA suggested FMCSA: (1) List the specific DOT modal regulations; (2) explain how to find records of violations for these rules, and (3) state the effect of such violations upon a driver's qualifications.

The SBA disagreed with the NPRM provision at § 382.413(a)(2) to require former employers to pass along driver information that a previous employer received from prior employers. The SBA recommended the FMCSA eliminate this requirement.

FMCSA Response: For reasons set forth under the following section entitled ''Impacts of Other Rulemakings,'' the agency has withdrawn conforming amendments to part 382, and believes the SBA concerns were largely addressed in previous rulemakings issued during 2000 and 2001 and affecting 49 CFR parts 40 and 382.

There is another issue on which FMCSA requests comments. Section 4014 of TEA–21, codified at 49 U.S.C. 508 (a)(3), relating to limitation on liability, states the limitation applies to ''the agents or insurers of a person described in paragraph (1) or (2).'' Section 508 (b)(1) restricts applicability of the limitation on liability within the requesting process for use by motor carriers. Sub item (B) specifically applies to agents and insurers by requiring that ''the motor carrier and any agents and insurers of the motor carrier have taken all precautions reasonably necessary to protect the records from disclosure to any person, except for such an insurer, not directly involved in deciding whether to hire that individual.'' Section 508 (b)(2) restricts applicability of the limitation on liability to the previous motor carrier providing the information. Sub item (B) applies to insurers by requiring that ''the complying person and any agents and insurers of the complying person have taken all precautions reasonably necessary to protect the records from disclosure to any person, except for such insurer, not directly involved in forwarding the records.''

FMCSA points out that insurers are currently not allowed access to the drug and alcohol information by part 40. FMCSA interprets the requirements in section 114 of the HazMat Act as creating the authority to grant a limitation on liability if the drug and alcohol data is made available to the insurance providers, but does not mandate that they be given access to this information. Thus, for consistency with the existing drug and alcohol policy of the DOT established by part 40, FMCSA proposes that insurers be allowed access to the investigative information, but exclude any alcohol and controlled substances information provided by previous employers under written authorization of the driver applicant.

Comments are desired on whether alternative legal interpretations regarding insurer access to alcohol and controlled substances information are intended by the HazMat Act. If so, how should such access be managed? FMCSA does not have regulatory and enforcement authority to ensure the insurance providers remain in compliance with the requirement that the data only be used for the hiring decision.

Accidents

The SBA pointed out that immediate implementation of the proposal to extend the retention period for accident information from one to three years would be impossible, *i.e.,* it can only become three years after passage of time to allow motor carriers to retain accident data for up to that period. For this reason, the SBA suggested amending § 390.15 by stating that accidents occurring one year preceding the rulemaking or after its effective date must be kept for at least three years. Alternatively, the agency could provide compliance guidance that reminds field personnel that motor carriers may be unable to immediately provide information about accidents occurring more than a year prior to the effective date of the rule because it was not previously required. The SBA believes the agency should encourage field personnel to waive penalty or enforcement against carriers until sufficient time has elapsed to fully comply with the new accident recordkeeping requirement under § 390.15.

FMCSA Response: The FMCSA agrees with the recommendation to phase in this requirement and has amended § 390.15 to reflect the suggested phase in process.

Employment History Form

SBA and other commenters suggested the agency should include more details specifying the minimum data that must be investigated, and provided by previous employers. SBA additionally recommended that FMCSA develop, as part of its guidance materials, a non-mandatory form for use by inquiring and responding employers.

FMCSA response: In this SNPRM, FMCSA has clarified in the proposed § 391.23(d) and (e) the information that must be investigated and provided, and also eliminated redundant amendments to § 382.413. The description of the required alcohol and controlled substances records in proposed § 391.23(e) is revised to convey that only those existing records filed pursuant to § 382.401 are required. If the previous employer cannot provide the information regarding completion of a rehabilitation referral, the investigating employer must obtain it from the driver.

Summary of the SNPRM

The importance of obtaining access to previous employer driver safety performance history information is long established as a best hiring practice. The purpose of this proposed regulation is to enhance the ability of prospective

employers to make sound hiring decisions. The procedures proposed in this SNPRM will enable obtaining more complete driver safety performance information by motor carriers. It will also maximize the use of this information by providing a limitation on liability of those providing and using this information, while subjecting them to administrative controls to protect driver privacy.

The SNPRM specifies minimum safety performance history data that a motor carrier must investigate about a driver's employment history under the proposed § 391.23(d) and (e). It differs from the NPRM by: (1) Refining the list of what information is to be investigated from previous employers, (2) establishing employer protections for providing and using the safety performance history information, (3) clarifying drivers' rights to review, correct or rebut information provided, (4) providing enhanced Regulatory Flexibility Act and Paperwork Reduction Act analyses, and (5) dropping conforming amendments to part 382 because they were already addressed under separate rulemakings discussed in the preamble.

FMCSA has refined the safety performance history data list in response to comments to the docket and because of changes to agency drug and alcohol regulations made by recent rulemakings. Section 4014 of the TEA–21 mandated the new employer liability limitation and driver protections being proposed. Enhanced Regulatory Flexibility analysis is provided in response to comments to the docket from the Small Business Administration.

Impacts of Other Related Rulemakings

Recent Changes in Alcohol and Controlled Substance Regulations

When the NPRM for driver safety performance history was issued in 1996, the detailed regulations governing investigations into an employee's drug and alcohol history were codified at 49 CFR 382.413. Since that time, DOT has revised its major regulations regarding drug use and alcohol abuse. Changes to the DOT drug and alcohol regulations, 49 CFR part 40, were finalized in a document entitled ''Workplace Drug and Alcohol Testing Programs; Final Rule'' (65 FR 79462, December 19, 2000). A correction to the final rule was published at 66 FR 3884, January 17, 2001; final compliance date details were published at 66 FR 28400, May 23, 2001; and technical amendments to the December 2000 final rule were published at 66 FR 41944, August 9, 2001. These documents are available in DOT docket number OST–1999–6578. The Department's program written by the Office of the Secretary and jointly issued by each of the Operating Administrations was finalized at 66 FR 41955, August 9, 2001. It provides the background for and an overview of the general, common elements of the modal rules. FMCSA finalized conforming amendments to the part 40 changes in its drug and alcohol regulations codified at 49 CFR part 382 and published them in a final rule at 66 FR 43097, August 17, 2001. A copy of that document has been placed in DOT docket number FMCSA–2000–8456.

Among other things, these rules streamlined drug and alcohol testing program requirements for all of the Department's modal entities having drug and alcohol regulations. All DOT regulated employers—not just motor carriers—must investigate the drug and alcohol history of a person intended to be deployed in a safety-sensitive function. Similarly, DOT-regulated employers must immediately respond to such investigations. The specific requirements governing investigations about drug and alcohol information were revised and moved from § 382.413 to 49 CFR § 40.25. The new § 382.413 cross-references § 40.25.

The HazMat Act directs the Secretary to amend § 391.23. Section 114(b)(2) of the HazMat Act requires motor carriers covered by part 391 to investigate certain drug and alcohol information about a driver as well as investigating his/her employment history. The motor carrier drug and alcohol investigation requirements were in existence when the HazMat Act was signed into law (codified at 49 CFR part 382, which applies only to motor carriers subject to the 49 CFR part 383—Commercial Driver's License Standards, Requirements and Penalties).

Because Congress specified no changes for part 382, FMCSA believes Congress also intended that the new § 391.23 requirement specify that motor carriers not otherwise subject to the alcohol and controlled substances testing requirements under part 382, or the CDL standards in part 383, are also required to investigate this data. This would create an extra level of safety by requiring these motor carriers to investigate a driver's alcohol and controlled substances history if the driver previously held a safety sensitive position subject to the part 382 requirements. This includes obtaining information about drivers who may have violated part 382 prohibitions, and may be seeking to work for uncovered motor carriers without having completed DOT return-to-duty requirements, or who have relapsed subsequent to treatment.

FMCSA believes the new part 40 adequately reflects the spirit of section 114 of the HazMat Act because it directs employers to: (1) Investigate completion of a SAP's rehabilitation referral, (2) immediately respond to drug and alcohol history investigations from new or prospective employers, and (3) retain certain drug and alcohol records for up to 3 years. This is because the § 40.25(b)(5) requirement for ''documentation of the employee's successful completion of DOT return-to-duty requirements * * *'' describes in a positive voice the intent under the HazMat Act section 114 that motor carriers investigate a driver's possible failure to undertake or complete recommended treatment.

Because the Department has: (1) Recently completed extensive revisions to its alcohol and controlled substances regulations, (2) incorporated provisions that accomplish the intent of section 114, and (3) thoroughly determined the information collection burdens and economic impacts of these changes, the FMCSA believes it is unnecessary to propose changes to part 382. The HazMat Act requirement for modifying § 391.23 to investigate 3-years of possible alcohol and controlled substances information for all drivers hired by motor carriers covered by part 391 is placed in § 391.23(e).

Existing § 382.413 cross-references § 40.25 requirements that an employer investigate an employee's (in the case of FMCSA regulated entities, a driver's) 2-year drug and alcohol history. That investigation would include, among other things, information about the successful completion of DOT return-to-duty requirements for any employee found to have violated DOT alcohol and controlled substances rules (*i.e.*, the alcohol and controlled substances regulations of any DOT agency). The existing requirement in § 40.25 to investigate two years of information is one year less than required by section 114 of the HazMat Act and the proposed § 391.23(e) in this SNPRM. Both require motor carriers to make a 3-year investigation of the alcohol and controlled substances history, and for previous employers to provide that information.

The major difference between § 40.25(b)(5) and § 391.23(e) involves the time period and scope of the alcohol and controlled substances testing records. This SNPRM would require a prospective employer to investigate a previous motor carrier's employer information about violations of only the

FMCSA alcohol and controlled substances regulations (*i.e.*, 49 CFR part 382, subpart B). Note that part 382 in conformance with part 40, requires motor carriers to investigate alcohol and controlled substance information from any previous employer during the prior two years where the driver held a safety sensitive job.

Specifically, the prospective motor carrier would have to investigate whether a driver had received a rehabilitation referral from an SAP pursuant to § 382.605. If so, the prospective motor carrier would have to receive: (1) Documentation of the driver's successful completion of DOT return-to-duty requirements, and (2) any positive test results or refusals to be tested that occurred subsequent to completion of return-to-duty requirements.

In a related issue, FMCSA would continue not requiring previous employers to divulge information regarding self disclosed violations of the alcohol and controlled substances prohibitions made under § 382.121. Such disclosures are not required to be reported as testing violations nor are they subject to DOT return-to-duty requirements.

Request for Comments

The FMCSA requests comments on any and all aspects of the revised proposals in this SNPRM. The comments to the docket on the NPRM remain active. Thus, there is no need to revisit the issues discussed in the 1996 NPRM.

Rulemaking Analyses and Notices

Regulatory Notices

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Executive Order 12866 (Regulatory Planning And Review) And DOT Regulatory Policies And Procedures

The FMCSA has determined this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). It has been reviewed by the Office of Management and Budget. The subject of requirements for background checks of prospective driver safety performance history information will likely generate considerable public interest within the meaning of Executive order 12866. We have classified the rule as significant because of the high level of public and congressional interest in the rule.

This SNPRM modifies an earlier notice of proposed rulemaking by: (1) Including an expanded discussion of the economic and information collection burdens of the proposal, (2) setting limitations on employer liability for using and providing the safety performance history data of a driver by including the requirements of section 4014 of TEA–21 codified at 49 U.S.C. 508, and (3) establishing the Act's required due process rights of drivers. FMCSA anticipates that the economic impact of this SNPRM will not exceed the annual $100 million threshold for economic significance.

Under a following section of this SNPRM entitled ''Regulatory Evaluation: Summary of Benefits and Costs,'' the agency estimated the first-year costs to implement this rule would amount to approximately $10 million. Total discounted costs over the 10-year analysis period (2003–2012) would be $76 million, using a discount rate of seven percent. All these costs are associated with the statutorily mandated requirements of section 114 of the Hazmat Act and section 4014 of TEA–21. The first-year net benefits associated with this rule would be negative. Total discounted benefits over the 10-year analysis period (2003–2012) would be equal to $88 million. Total discounted net benefits from implementing this rule would equal $12 million over the 10-year analysis period (2003–2012).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement and Fairness Act (SBREFA), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In response to SBA's request for more information on the economic impact of this proposed rule upon small entities, and the determination that this is considered a significant rulemaking proposal, the agency has prepared an initial regulatory evaluation and the following RFA analysis.

(1) *A description of the reasons why action by the agency is being considered.* A large number of motor carriers must hire drivers to operate large commercial motor vehicles on the nation's roads and highways. These drivers are responsible for safe, secure and reliable operation of these vehicles on the nation's roads and highways. Public concern regarding the safety of commercial motor vehicles and their operators has heightened awareness of the limited driver safety performance information available to prospective motor carrier employers when making hiring decisions. If prospective employers had access to more information about driver safety performance history it would enable employers to make more informed decisions regarding the relative safety risk of drivers who apply for employment.

With enactment of section 114 of the HazMat Act, Congress directed FMCSA to revise its safety regulations to specify additional minimum driver safety performance information a prospective employer must investigate from previous employers. Additionally, the HazMat Act sets a time limit for previous employers to respond to the investigations, and provides the driver an opportunity to review and, if necessary, correct or rebut the safety performance information provided by current or previous employers to the prospective employer.

In response to industry concerns about the legal liability which would arise from providing information about driver employment safety history, Congress determined that the societal importance of this information is sufficient to grant limited liability to motor carriers by preempting State and local laws and regulations creating liability. This is carried out in section 4014 of TEA–21. The liability limitation applies to prospective and previous employers, their agents, and their insurance providers from defamation suits when investigating, using or providing accurate information about safety performance histories of their drivers. The right of drivers to review such employer investigation records, and to have them corrected or include a rebuttal from the driver, is made statutory. FMCSA is directed to develop procedures for implementing these requirements as part of the changes to § 391.23 mandated by section 114 of the HazMat Act.

(2) *A succinct statement of the objectives of, and legal basis for, the proposed rule.* The legal bases for this proposed rule are the Congressional directives contained in section 114 of the HazMat Act and section 4014 of TEA–21. Congressional intent is to ensure prospective motor carriers have

access to increased information about the safety performance history of drivers, including access to investigation information from prior employers about driver applicants.

Regulations at § 391.23(a)(2) and (c) currently require prospective employers to investigate a driver's employment record with previous employers. The regulations do not specify what information prospective employers must investigate, nor do they require previous employers to respond to investigations received from prospective employers. Comments to the docket for this rulemaking such as those from Dart and Fleetline, Food Distributors International, Interstate Truckload Carriers Conference, American Movers Conference, United Motor Coach Association, and the National Private Truck Council state that many previous employers are either not responding, or not providing any information other than verification of employment and dates.

Further, comments to docket FMCSA–2001–9664 state that many previous employing motor carriers either do not respond to investigations for alcohol and controlled substances information, or do so belatedly, making the data of questionable value in the hiring decisions. Docket 9664 contains the **Federal Register** notice and numerous comments regarding the requirement of section 226 of MCSIA for a Report to Congress on the possibility of requiring employers to report positive controlled substances test results and for prospective employers to check such a computer source for the existence of such information as part of the hiring decision process. A copy of section 226 of MCSIA is included in the docket as document 40.

The objective of this proposed rulemaking is to improve the quantity and quality of investigations made to previous employers, as well as the quantity, quality and timeliness of background driver safety performance information provided to prospective employers. This should foster more informed employment judgments about the safety risks of potential new employees, while affording drivers the opportunity to review and comment on the accuracy of information provided by previous employers.

This proposed regulation specifies minimum information that must be investigated, and proposes process modifications to facilitate this information exchange so as to minimize the reporting burden, including establishing the limit on potential liability of employers, their agents and insurance providers from defamation lawsuits, etc.

(3) *A description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.* This proposal will apply to all motor carrier employers regulated by the FMCSRs whose employees apply to work for a motor carrier in interstate commerce. This includes small motor carriers as well as numerous entities in other industries covered by the FMCSRs because they operate their own private commercial motor vehicles. Examples include drivers who operate CMVs in industrial categories such as: bakeries, petroleum refiners, retailers, farmers, bus and truck mechanics, cement masons and concrete finishers, driver/sales workers, electricians, heating, air conditioning and refrigeration mechanics and installers, highway maintenance workers, operating engineers and other construction equipment operators, painters construction and maintenance workers, plumbers, pipefitters and steamfitters, refuse and recyclable material collectors, roofers, sheet metal workers, telecommunications equipment installers and repairers, welders, cutters, solderers, and brazers.

The SBA regulations at 13 CFR part 121 specify Federal agencies should analyze the impact of proposed and final rules on small businesses using the SBA Small Business Size Standards. Where SBA's standards do not appropriately reflect the effects of a specific regulatory proposal, agencies may develop more relevant size determinants for rulemaking.

The regulatory evaluation below estimates the number of driver hiring decisions affected by this proposed rule at approximately 419,000 annually. This estimate is a function of three components, including (1) annual driver turnover within the industry, (2) annual employment growth within the industry, and (3) an increase in the number of drivers required to fill vacancies left by those denied employment when the background information proposed in this SNPRM becomes available to prospective employers.

It is difficult to determine exactly how many existing motor carriers would be affected by this proposed rule, since it is not known year-to-year how many employers on average hire drivers. However, it is known from the Motor Carrier Management Information System (MCMIS) that there are approximately 500,000 active motor carriers currently operating in interstate commerce in the United States (this includes both for-hire and private motor carriers, but deducts a number of carriers believed not to be currently operating but still having files within MCMIS). Data from the 1997 Economic Census (U.S. Census Bureau), Standard Industrial Classification (SIC) Code 4213 ''Trucking, Except Local'' indicates that over 90 percent of trucking firms in that SIC code had less than $10 million in annual sales in 1997 ($10 million in annual revenues represents the threshold for defining small motor carriers in this analysis).

Because the FMCSA does not have annual sales data on private carriers, we assume the revenue and operations characteristics of the private trucking firms would be generally similar to those of for-hire motor carriers. Using the 90-percent estimate to identify the small business portion of the existing industry indicates that 450,000 out of 500,000 total existing motor carriers could be defined as small businesses within this industry. Also, we had estimated that a net 419,000 hiring decisions would be affected by this proposed rule annually. These 419,000 net annual hirings within the industry represent 14 percent of the total three million drivers currently employed within the trucking industry. To be conservative, we assumed that 14 percent of existing motor carriers would be filling the 14 percent of driver positions each year. Therefore, 14 percent of existing motor carriers translates to 70,000 out of the 500,000 existing motor carriers who would be hiring drivers each year.

We conservatively assumed that these 70,000 hiring employers would bear the full cost of the data retention and reporting on the 419,000 drivers to be hired each year for the driver data search, duplication, and reporting costs incurred by previous employers for providing the information. (This may not be true based on FMCSA policy that the previous employer cannot demand payment as a condition for releasing the data.) Conversely, if we assumed previous employers would bear these costs (and we assume at least one previous employer to each driver over the past three years), we could divide compliance costs by 140,000 carriers. However, to ensure we do not underestimate the impact to small employers, we will stick with the 70,000 estimate.

Total discounted compliance costs of this proposed rule are estimated at $76 million over the 10-year analysis period (2003–2012), while first-year costs (in 2003) are estimated at $10 million. If we divide these first-year costs by the 70,000 hiring companies estimated to be hiring drivers within a given year, the

result is a total compliance cost of roughly $143 per motor carrier in the first year of implementation.

Data from the 1997 Economic Census, SIC 4213 (derived from NAICS Categories 484121, 484122, 484210, and 484230) divides trucking firms into 11 revenue categories, beginning with those firms generating less than $100,000 in annual gross revenues and ending with those generating $100 million or more. As stated, ''small'' trucking firms are defined here as those that generate less than $10 million in annual revenues. The 1997 Economic Census divides these firms into eight specific revenue categories. The annual revenue categories, the number of firms in each, and the average annual revenues of firms in each category are listed below in Table 1.

TABLE 1.—AVERAGE ANNUAL REVENUES OF SMALL TRUCKING FIRMS (SIC 4213, ''TRUCKING, EXCEPT LOCAL), BY REVENUE CATEGORY

Revenue category ($1,000s)	Number of firms/% of total small firms	Average annual revenues ($1,000s)	Compliance costs ($143), as % of avg. revenues percent	Average pre-tax profit margins, by revenue size (percent)
<$100	1,487 (5%)	$67	0.21	9.5
$100–$249.9	8,715 (30%)	160	0.09	9.5
$250–$499.9	5,687 (19%)	$356	0.04	9.5
$500–$999.9	4,890 (17%)	710	<0.01	9.5
$1,000–$2,499.9	4,819 (16%)	1,580	<0.01	2.8
$2,500–$4,999.9	2,414 (8%)	3,490	<0.01	2.9
$5,000–$9,999.9	1,407 (5%)	7,000	<0.01	3.5
Total	29,419 (100%)			

Source: 1997 Economic Census, Sales Size of Firms, NAICS Categories 484121, 484122, 484210, and 484230 aggregated to SIC 4213.

We applied the total first-year regulatory compliance costs ($10 million) to the number of existing motor carriers in the industry we anticipated would be hiring drivers in that year (70,000). As seen in the above table, the compliance costs of this proposed rule per existing motor carrier ($143) represent 0.21 percent (or a little more than 2/10 of one percent) of gross annual revenues of the smallest firms (*i.e.*, those with annual gross revenues less than $100,000). For the second smallest revenue group, compliance costs represent 0.09 percent of gross revenues in the first year.

Data obtained from Robert Morris Associates (RMA) in 1999 on pre-tax profit margins of trucking firms in SIC Code 4213 are contained in the right-hand column of the above table. For all firms with less than $1 million in annual revenues, the RMA listed average pre-tax profit margins of 9.5 percent. Since the 1997 Economic Census data had additional revenue categories, FMCSA applied the same profit margins (9.5%) to all firms with annual revenues of less than $1 million. The data reveal that total discounted 10-year costs to existing motor carriers would reduce, although not eliminate average pre-tax profits for carriers in any of the carrier revenue groups. The smallest revenue group in this table (<$100,000 annual revenues), which represents 5 percent of the firms in the Economic Census table, would experience an average reduction in pre-tax profit margins of 2.2 percent (0.25/9.5=2.2%). For the second smallest revenue group ($100—249.9), which represents 30 percent of the small carriers in this motor carrier group, pre-tax profit margins are reduced by about 0.9 percent. For the third smallest revenue group, the annual compliance costs associated with this proposed rule are expected to reduce these carriers' average pre-tax profit margins by 0.4 percent.

(4) *A description of the proposed reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report.*

Reporting. No new reporting to the Federal government or a State is required. New reporting is required by all motor carrier employers of the previous three years to prospective motor carrier employers. For employees who assert their right to disagree with the investigative driver safety performance data reported by that previous employer, those previous employers will also be required to work with their previous employees.

In the case of alcohol and controlled substances all previous employers subject to DOT drug and alcohol regulations or their agents, are required by 49 CFR 40.25(h) to report specified minimum employer investigative safety performance history data for their previous employees to prospective employers upon receiving an investigation.

Data to be provided would include at least the following:

1. Information verifying the driver worked for that employer and the dates of employment.

2. The driver's three-year alcohol and controlled substances history, an increase of one year from the two-year history now required, which will make it the same as the already required three-year retention of this data.

3. Information indicating whether the driver failed to undertake or complete a rehabilitation referral prescribed by a SAP within the previous three years, but only if that information is recorded with the responding previous employer. Previous employers would not be required to seek alcohol and controlled substance data they are not already required to retain by part 382.

4. Information indicating whether the driver illegally used alcohol and controlled substances after having completed a rehabilitation referral, but only if recorded with the responding previous employer. Previous employers would not be required to seek alcohol and controlled substances data they are not already required to retain by part 382.

5. Information indicating whether the driver was involved in any accidents as defined in § 390.5.

Previous employers or their agents for three years after a driver leaves their employ will be required to respond within 30 days to investigations from prospective motor carriers about an applicant and provide at least the minimum information specified in this proposed rulemaking.

Motor carriers are already required to respond to alcohol and controlled

substances inquiries under part 382. However, requests for that data are the last information requested in the screening process because of the requirement for a signed authorization to release any such data, and this occurs only for that portion of drivers still under consideration for employment. This proposed rule would enhance the ability to take enforcement action if a previous employer does not provide the information required in a timely manner.

All small entities for the previous three years would now be required to provide their employment investigative safety performance history data. That data, minus the alcohol and controlled substances data, likely would be requested routinely for all driver applicants from all previous motor carriers as part of the initial employment screening process that does not require signed authorization. For those drivers still under consideration for employment, the same previous employers could receive a subsequent second request for the alcohol and controlled substances information.

The 1997 CDL Effectiveness study contained a report of a focus group meeting of motor carrier safety directors. (CDL Focus Group Study, November 1996, copy of the Safety Director comments are included in docket as document 41.) It documents that a number of motor carriers require drivers to have obtained previous experience driving a CMV before that motor carrier will hire the driver. If some employers operate more as employers of entry-level drivers, then they could often be required to provide investigation information, but not get much benefit of receiving such investigations from other previous employers. In such cases, if the motor carriers furnishing the investigation data are small entities, the costs could potentially rise to the level of a significant economic impact on a substantial number of small entities.

If such entities are unable to insist on receiving payment for the costs of performing this function prior to releasing the data because of FMCSA policy, there could be a negative impact on them. FMCSA requests comments on how significant this might be.

Recordkeeping. It is a largely accepted industry practice that alcohol and controlled substance information is kept separately from the driver qualification file. This is a practical arrangement that assists employers to easily defend that the data is adequately secured and access to it is controlled, in compliance with the recordkeeping requirements of part 382.

Employers are currently required by § 391.23(c) to keep prior employer furnished investigative information in the driver qualification file. Because 49 U.S.C. 508 restricts previous employer investigative data to just the hiring decision, this SNPRM proposes changing the specification of where previous employer investigative information is kept to instead be with the alcohol and controlled substance data in the already established controlled access, secure file. Because such a file already exists, there should be no significant impact on recordkeeping requirements of prospective employers.

Professional skills. Motor carriers are already required to provide alcohol and controlled substances data. That function requires a person who is designated as having controlled access to that data. The addition of reporting accident data could be an added responsibility of the person already required to report the alcohol and controlled substances data.

(5) *An identification, to the extent practicable, of all Federal rules which may duplicate, overlap, or conflict with the proposed rule.* The Fair Credit Reporting Act (FCRA) specifies procedures that must be followed by consumer reporting agencies when providing inquiry and investigative data to motor carriers as part of the hiring decision process. If such a consumer reporting agency is also the agent of a motor carrier, then there could be overlap between proposals in this SNPRM and the FCRA.

(6) *A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.* The FHWA published an NPRM on March 14, 1996 (61 FR 10548) following the detailed prescriptive specifications contained in section 114 of the HazMat Act. It proposed processes for investigations with previous employers and use of that data in the hiring decision process. This SNPRM responds to additional prescriptive requirements contained in section 4014 of TEA–21, and to concerns expressed by various commenters, including the SBA. FMCSA believes that the alternatives discussed in this SNPRM are the ones available to the agency within the mandates of the HazMat Act and the TEA–21.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of $100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. FMCSA has determined that the changes proposed in this rulemaking would not have an impact of $100 million or more in any one year.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (April 23, 1997, 62 FR 19885), requires that agencies issuing ''economically significant'' rules that also have an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a ''covered regulatory action'' an evaluation of its environmental health or safety effects on children. The agency has determined that this rule is not a ''covered regulatory action'' as defined under Executive Order 13045.

This rule is not economically significant under Executive Order 12866 because the FMCSA has determined that the changes in this rulemaking would not have an impact of $100 million or more in any one year. This rule also does not concern an environmental health risk or safety risk that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

The safety performance of drivers operating commercial motor vehicles on

the nation's roads and highways is a matter of national concern. Congress recognized the need for mandating a more complete background check of drivers' safety performance from previous DOT regulated employers when drivers apply to work for a new motor carrier employer. This data is vital to prospective employers establishing a driver's safety performance history. In section 114 of the HazMat Act, Congress directed FMCSA (then FHWA) to amend its regulations to specify the minimum safety information that a motor carrier must investigate from a driver's former DOT regulated employers, and require those employers to provide that data to the requesting motor carrier in a timely fashion.

The motor carrier industries expressed great concern that the proposals in the 1996 NPRM could subject them to considerable litigation and expense by drivers denied employment based on this data. In section 4014 of TEA–21, Congress responded to those concerns and specifically granted limited liability to employers and agents furnishing and using this information by preempting State and local laws and regulations creating such liability. It directed FMCSA to include provisions addressing implementation of this limited liability in a revision to the previously issued 1996 NPRM.

Section 4014 of the 1998 TEA–21 explicitly says ''No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using safety performance records in accordance with regulations issued by the Secretary to carry out this section.'' This Federal preemption of State or local jurisdictions' liability rights is codified at 49 U.S.C. 508, and is intended to facilitate the transfer of this vital investigative driver safety information between DOT regulated employers. The liability limitation does not apply if it is proven the previous employer provided incorrect information.

The Act replaces the litigation alternative with a mandated administrative process as the means for a prospective driver to address their privacy rights to challenge potentially incorrect safety performance data provided by a previous employer. This mandated process would enable a driver to review his/her investigative information provided by a previous DOT regulated employer, request correction of incorrect information, and require inclusion of a driver provided rebuttal if agreement is not reached between the driver and the previous employer furnishing the investigative background information.

The Act says ''* * * provide protection for driver privacy and to establish procedures for review, correction, and rebuttal of the safety performance records of a commercial motor vehicle driver.'' The process proposed in this SNPRM is similar to what is specified under the Fair Credit Reporting Act (FCRA) (15 U.S.C. 1681 *et seq.*) for protecting a person's rights when investigating previous employer background information. Processes are also proposed in this SNPRM for recordkeeping to make it possible for FMCSA to verify that previous and prospective employers are conforming to the agency's proposed processes protecting driver rights.

Drivers, State and local subdivisions, and others still have the right to allege non-compliance with these proposed regulations by reporting to FMCSA under its complaint procedures at 49 CFR 386.12. Such complaints could result in an enforcement follow-up for a motor carrier compliance review. An increasing number of States are participating under the MCSAP grants as the investigating agents for FMCSA of these motor carrier regulations, *i.e.*, in such States it is State agents that perform motor carrier compliance reviews. Thus, States could be the investigating agents to verify that employers are complying with the driver protections proposed in this SNPRM.

This action was analyzed in accordance with the principles and criteria contained in Executive Order 13132 that requires agencies to certify they have evaluated Federalism issues. The original NPRM was published in 1996 and there was no preemption of State or local liability laws or regulations in that proposal. Consequently, the agency did not receive any comments from elected State or local officials on the preemption issue.

We anticipate implementation of this proposed rule change, in conformance with the specification contained at 49 U.S.C. 508(c), would not add any additional costs or preemption burdens to States or local subdivisions. We also anticipate these changes would have no effect on the State or local subdivisions' ability to discharge traditional governmental functions.

Because the preemption requirement set forth in this SNPRM was established in 1998 by the TEA–21, this is the first time this preemption is being set forth as a proposed regulatory change. FMCSA is seeking comments on possible compliance costs or preemption implications from elected State and local government officials as part of this SNPRM stage.

Comments to the docket are sought from State and local officials on whether there may be any major concerns about the proposed preemption of State and local law and regulations for these Federally protected interests. The FMCSA is requesting States and local government officials, or their representatives, to express any concerns they may have by submitting comments to the public docket. The agency will address any concerns prior to issuing a final rule on this subject.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), requires Federal agencies to obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined that the proposals in this SNPRM would impact and/or reference three currently-approved information collections (IC), as follows: (1) Driver Qualification Files, OMB Control No. 2126–0004 (formerly 2125–0065), approved at 941,856 burden hours through December 31, 2005; (2) Accident Recordkeeping Requirements, OMB Control No. 2126–0009 (formerly 2125–0526), approved at 37,800 burden hours through September 30, 2005; and (3) Controlled Substances and Alcohol Use and Testing, OMB Control No. 2126–0012 (formerly 2125–0543), approved at 573,490 burden hours through August 31, 2004.

The effect of this SNPRM on the burdens of the last two of these will be minimal, and will relate primarily to the length of time that records must be kept. The FMCSA, while acknowledging that there may be a minor impact associated with these collections, is not making estimates or discussing these minimal impacts at this time. Instead, the agency is focusing on the information collection regarding Driver Qualification Files, which will be impacted in a significant manner by this proposed rule.

For purposes of this information collection, the agency is using 6,458,430 as the estimate of the number of interstate and intrastate drivers that could be impacted by this proposal. Several existing FMCSA information collections employ this number (OMB Control No. 2126–0001—Drivers Records of Duty Status; OMB Control No. 2126–0004—Driver Qualification Files; and OMB Control No. 2126–0006—Medical Qualification Files). The agency believes this high-end estimate captures all drivers who may be affected by the new information collection burdens being proposed. The agency continues to explore methods of more precisely determining the number of drivers that could be affected by FMCSA regulations.

The truck driving industry is characterized, in general, by a high driver turnover rate. Previous information collections have estimated there are burden hours associated with 839,596 driver applications each year. That represents 13 percent of the 6,458,430 truck driver positions. Comments to the docket describe various driver-screening processes used by trucking companies to fill these driver positions. However, no data is currently available on how many applicants, or what percentage of applicants, are denied employment using current screening practices. FMCSA requests comments addressing what the current denial rates may be under existing driver screening processes.

This proposed rule would provide employers with more information about the background and safety history of the applicants for employment as drivers. The agency estimates that an additional 10 percent of the driver applicants with accidents over the last 3 years (14,300) and 25 percent of the drivers with positive alcohol or controlled substances tests for the 1 additional year (1,300) will be refused employment because of the heightened scrutiny of their background information. Rounded up to the nearest thousand, this represents 16,000 additional drivers that will be involved in the hiring process. Employing these figures, the agency estimates this proposed rule would require motor carriers to make requests for driver safety background information for a total of approximately 855,596 (839,596 + 16,000) drivers.

In addition, the proposed rule would require the prospective employer to seek information from all previous employers for whom the applicant has worked in the past 3 years. For purposes of this information collection, the agency is estimating that, on average, each applicant had 1.39 employers in the past 3 years. Therefore, the number of requests for background information would be 1,189,278 (1.39 employers × 855,596 drivers).

This proposed rule would also require driver applicants to be advised they can review, request correction, or rebut what a previous employer provided as that driver's employment history with that employer. The majority of these notifications would be made via a statement on the job application; therefore, we are not assigning an information collection burden for this notification. We request comments on whether there might be any significant burden in sectors of the industry using telephone job application processes.

The currently-approved Driver Qualification Files information collection can be broken down into two sections: (1) Addressing the burdens of prospective employers and driver applicants during the hiring process, and (2) addressing the burdens related to carriers and drivers who are currently employed (*e.g.,* annual review). This proposed rule would require revisions to the first section and leave the second section unchanged. In addition, it would create a third section—to address new burdens imposed by the proposed rule on the former employers of drivers. The resulting three elements of this information collection, as proposed, would be: (1) The hiring process (prospective employers and driver applicants), (2) the annual review (current employers and drivers), and (3) the responsibilities of previous employers.

First Element of IC. The changes proposed by this SNPRM to the first item—the hiring process—address the specific types and timeframes of employment history to be requested (includes accident data). The proposed changes to specific types of safety performance history requested and timeframes of employment do not increase the information collection burden for the prospective employer investigations as part of the hiring process. However, prospective employers would be required to notify drivers of their right to review their safety performance history received from prospective employers and provide them with that information, if requested. The burden estimate for this element is 1,333 burden hours (16,000 drivers × 5 minutes for prospective employers to provide the data to each of those drivers, divided by 60 minutes).

Another increase regarding the various elements of the hiring process is to adjust the number of driver applicants estimate to include 16,000 additional drivers who would need to apply to fill the positions of the 16,000 it is estimated would not be hired due to enhanced safety performance history data being received. The increase in the various elements within the hiring section results in an additional burden of 4,799 hours for this first IC item (799 hours for the driver and motor carrier to perform 16,000 additional employment application-related activities + 4,000 hours for motor carriers to request driving and safety performance history data for 16,000 additional applicants).

Second Element of IC. The second element of the Driver Qualification Files—annual review—would be unaffected by this proposal.

Third Element of IC. The third element of this information collection is created due to the changes made in this SNPRM. In the past, previous employers were not required to systematically provide employment history on their former employees. This proposal would require all employers to provide driver safety performance history data (including accident data) for the 3-year period preceding the date of the request. The annual burden for this requirement is estimated to be 99,107 burden hours (855,596 drivers × an estimated 1.39 previous employers per driver × 5 minutes, divided by 60 minutes).

This rule also proposes a new right for former drivers to protest or rebut employment data supplied by previous employers to prospective employers. Prospective employers would be required to provide the driver applicant with copies of the information it receives from the former employer. Former employers would have a duty and be required to: (1) Provide the past employee/driver the opportunity to rebut; (2) review a rebuttal, if submitted; (3) amend records, if persuaded by the rebuttal; (4) append the driver's rebuttal to the record, if not persuaded to revise their records by the rebuttal; and (5) keep a copy of the rebuttal with the file and send: (a) the revised record to the prospective employer, or a copy of the driver's rebuttal, and (b) the employment history with the appended rebuttal when requested in the future.

The agency assumes that 16,000 drivers would protest the employment history provided by former employers. The FMCSA estimates it would take approximately 2 hours for the driver to create and submit a protest. It is further estimated that it would take the previous employer 2 hours to address and respond to each protest. Therefore, the burden estimate for this activity is 64,000 hours ((16,000 × 2 hours per protesting driver) + (16,000 × 2 hours per previous employer)).

The total burden associated with this third area is 163,107 (99,107 (burden associated with previous employers providing safety performance history) + 64,000 (burden associated with rebuttals/protests)).

Accordingly, Table 2 estimates that the total burden hour increase for the Driver Qualification Files information collection would be 169,239 (1,333 (notification and driver rights to review data received) + 4,799 (adjustment taking into account the additional 16,000 drivers who would need to go through the hiring process when this proposed rule is promulgated) + 99,107 (providing 3 years of safety performance history) + 64,000 (duties associated with drivers who rebut and protest employment history)).

TABLE 2.—DRIVER QUALIFICATION FILES INFORMATION COLLECTION

New activity	Estimated burden hours
Notification and driver rights	1,333
Adjustment for 16,000 additional applicants	4,799
Providing 3 years of safety performance history	99,107
Driver rebuttals	64,000
Total	169,239

Interested parties are invited to send comments regarding any aspect of these information collection requirements, including, but not limited to: (1) Whether the collection of information is necessary for the performance of the functions of the FMCSA, including whether the information has practical utility, (2) the accuracy of the estimated burden and the various assumptions made in this PRA section, (3) ways to enhance the quality, utility, and clarity of the information collection, and (4) ways to minimize the collection burden without reducing the quality of the information collected.

National Environmental Policy Act

The Federal Motor Carrier Safety Administration (FMCSA) is a new administration within the Department of Transportation (DOT). The FMCSA analyzed this rule under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) (NEPA), the Council on Environmental Quality Regulations Implementing NEPA (40 CFR 1500–1508), and DOT Order 5610.1C, Procedures for Considering Environmental Impacts.

This rule would be categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under paragraph 4.c.(3) of DOT's Order as a project amendment that does not significantly alter the environmental impact of the action. This rule would specify minimum safety performance history information to be sought and provided during the course of a § 391.23(c)(1) investigation into a driver's employment history.

Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because it is not economically significant and not likely to have a significant adverse effect on the supply, distribution, or use of energy. Additionally, the Administrator of the Office of Information and Regulatory Affairs has not designated this rule as a significant energy action. For these reasons, a Statement of Energy Effects under Executive Order 13211 is not required.

Regulatory Evaluation: Summary of Benefits and Costs

I. Background and Summary

The primary costs of this proposed rule involve retaining, investigating, providing, and reviewing additional driver safety performance data by employers (previous or current and prospective) for use in hiring decisions. Specific types of additional driver safety performance data include driver accident, alcohol/controlled substance test, and rehabilitation program data.

Specific costs to previous or current employers (hereafter referred to as previous employers) include retaining an additional two years of accident data on each of its drivers and reporting such investigative data to all prospective employers of drivers for three years after a driver leaves their employ. Current regulations require employers to collect and retain one year of accident data on drivers, and no requirement to report to prospective employers. Additionally, previous employers would be required to report on three years of alcohol/controlled substances test and rehabilitation program data to prospective employers (in lieu of the two years of data currently required by existing regulations).

Previous employers are already required by part 382 to report on driver violations of Federal regulations regarding alcohol and controlled substances use and/or failure to complete rehabilitation programs within the preceding two years. This SNPRM proposes adding a requirement to the § 391.23 pre-employment investigation requirements and increasing the number of years to be reported by previous employers from two to three years.

Specific costs to prospective employers include investigating driver accident and alcohol/controlled substances data from previous employers and using that data in hiring decisions. Current regulations require prospective employers to attempt to obtain appropriate driver Motor Vehicle Record(s) (MVRs) and to investigate employment records for the preceding three years.

FMCSA has a policy that previous employers cannot make receiving payment for their costs a condition of providing alcohol and controlled substances data. If this is also applied to this new requirement of providing accident data in response to investigations, then the costs incurred by previous employers for providing all safety performance history information will be largely borne by previous employers. If these costs are relatively equally shared, *i.e.*, each employer gets as much value from investigations to other employers as from providing the information, then who incurs these costs is not directly important to calculation of the estimated total costs of this proposed SNPRM.

The 1997 CDL Effectiveness study contained a report of a focus group meeting of motor carrier safety directors. (CDL Focus Group Study, November 1996, copy of the Safety Director comments are included in the docket as document 41.) It documents that a number of motor carriers require drivers to have obtained previous experience driving a CMV before that carrier will hire the driver. If some employers operate more as employers of entry-level drivers, then they could often be required to provide investigation information, but not get much benefit of receiving such investigations from other previous employers. In such cases, if the motor carriers furnishing the investigation data are small entities, the costs could potentially rise to the level of a significant economic impact on a substantial number of small entities. FMCSA requests comments regarding any information that might indicate a different analysis of costs should be used if such inequalities might be created by the existing FMCSA policy preventing motor carriers who are furnishing investigation information from receiving payment for the

information as a condition of releasing the information.

The discussion that follows is a summary of the costs and benefits associated with this proposed rule. For a complete discussion of the data used, assumptions made, and calculations performed for this analysis, the reader is referred to the docket, where a copy of the full regulatory evaluation report is contained. A summary of the costs associated with this proposed rule is included in Table 3.

TABLE 3.—SUMMARY OF COSTS, 2003–2012

[In millions of dollars]

First Year Costs	$10
Total Discounted Costs, 10-Year Period	76

First-year costs associated with this rule total $10 million, while total discounted costs over the entire 10-year analysis period total $76 million. These figures represent our best estimate of the costs associated with implementation of this rule. Where uncertainties exist regarding these cost estimates, we have noted them in the discussion and invite comment.

The benefits associated with this rule are contained in Table 4.

TABLE 4.—SUMMARY OF BENEFITS, 2003–2012

[In millions of dollars]

Benefits scenario	First-year benefits	Total discounted benefits, 10-year analysis period
Direct Benefits Only [1]	$6	$88
With 10% Deterrence Effect [2]	7	97
With 25% Deterrence Effect [2]	8	110
With 50% Deterrence Effect [2]	10	132

[1] Under the ''Direct Benefits Only'' scenario, all truck-related accident reduction benefits result from those commercial drivers with the worst safety performance records not being hired.

[2] Under the three benefits scenarios including a ''Deterrence Effect'', FMCSA assumes that the availability of and easier access to new commercial driver safety performance data would result in some drivers improving their driving behavior for fear that prospective employers would now use such data in future hiring decisions. Since we were unsure of the magnitude of this effect, we assessed the deterrence effect at zero, 10, 25, and 50 percent of direct truck-related accident reduction benefits.

In calculating benefits for this rule, we attempted to account for both direct and indirect benefits. Direct benefits are reductions in truck-related accidents that result from prospective employers not hiring certain commercial drivers (*i.e.*, those with poor accident or alcohol/controlled substance information) because the new accident and alcohol/controlled substance test and program data was made available by previous employers. Indirect benefits are those associated with a deterrence effect. The FMCSA assumes that the availability of and easier access to new commercial driver safety performance data would cause some percentage of drivers to improve their driving behavior, for fear that prospective employers would now obtain and use such data in their hiring decisions. Since we do not know the specific magnitude of the deterrence effect associated with this new data availability, we calculated this effect as a percent of the direct accident reduction benefits from this rule.

Comparing total discounted costs and benefits, we have calculated net benefits estimates and benefit-cost ratios for this rule. They are contained in Table 5.

TABLE 5.—SUMMARY OF NET BENEFITS AND BENEFIT-COST RATIOS, 2003–2012

[In millions of dollars]

Benefits scenario	Total discounted net benefits [1]	Benefit-cost ratio [2]
Direct Benefits Only	$12	1.16
With 10% Deterrence Effect	21	1.27
With 25% Deterrence Effect	34	1.45
With 50% Deterrence Effect	56	1.74

[1] Total Discounted Net Benefits were derived by subtracting the Total Discounted Cost estimate of $76 million in Table 3 from each of the Total Discounted Benefits estimates in Column 3 of Table 4. For example, subtracting the $76 million in total discounted costs from Table 3 by the $88 million in Total Discounted Benefits under the ''Direct Benefits Only'' scenario of Table 4 yields Total Net Discounted Benefits of $12 million over the 10-year analysis period (2003–2012) examined here.

[2] Benefit-Cost Ratios were derived by dividing the Total Discounted Cost estimate of $76 million in Table 3 from each of the Total Discounted Benefits estimates for each of the Benefits Scenarios located in Column 3 of Table 4. For example, dividing the $88 million in Total Discounted Benefits under the ''Direct Benefits Only'' scenario of Table 4 by the $76 million in total discounted costs from Table 3 yields a Benefit-Cost Ratio of 1.16 over the 10-year analysis period (2003–2012) examined here. A benefit-cost ratio greater than one implies that the rule is cost effective to implement when comparing costs to benefits within the 10-year analysis period.

When examining the total discounted net benefits and benefit-cost ratios, we see that in all scenarios identified in Table 4, this rule is cost effective when measured within the 10-year analysis period. The costs and benefits of this SNPRM will be discussed separately in the next two sections.

II. Costs

Accident Data

In 1997, the Gallup Organization performed a study for ATA where they estimated that 403,000 commercial drivers would need to be hired by the trucking industry each year between the years 1994 and 2005 in order to meet projected demand. Of this total, Gallup estimated that 320,000 (or 80 percent) would need to be hired due to internal

turnover (*i.e.*, drivers switching trucking companies), 35,000 (or 8 percent) would need to be hired due to industry growth, and 48,000 (or 12 percent) would need to be hired due to attrition, retirement, and external turnover (*i.e.*, drivers leaving trucking for alternative industries).

We anticipate that this proposed rule would alter some portion of the 403,000 driver hiring decisions made each year within the trucking industry. Because hiring managers will have additional accident and alcohol/controlled substance test data with which to select drivers for positions, it is likely that the new data would result in some drivers (who previously would have been hired) not being hired because of this rule. In this analysis, we estimated that roughly 16,000 of the 403,000 commercial drivers hired annually by the industry would now be denied employment because of the new accident and alcohol/controlled substance test data becoming available to prospective employers. Of these 16,000 total commercial driver applicants, 14,300 would not be hired because of the new accident data and 1,300 would not be hired because of the new alcohol/controlled substance test and program data. When rounded to the nearest 1,000 (our standard practice in this analysis), it yields 16,000 total driver applicants likely to be denied employment each year as a result of this proposed rule. Therefore, we estimated the total number of drivers being considered/hired for positions each year within the trucking industry at 419,000 (403,000 + 16,000).

To calculate the new accident records that would likely need to be stored and reported on as part of this rule, we used the average annual total for truck-related accidents for 1999 and 2000, which is equal to 445,000 (includes all truck-related fatal, injury, and property-damage-only accidents). Using an estimate of 3 million as the total existing driver population, we estimated the number of annual accidents per driver at 0.148 (*i.e.*, 445,000/3 million). In this analysis, we assumed drivers being hired due to internal turnover (*i.e.*, 320,000 positions) would be experienced drivers (*i.e.*, with accident records) and the remainder (*i.e.*, those hired due to attrition, retirement, and industry growth) would be new drivers (*i.e.*, those without previous accidents). As such, the number of accidents for which the number of drivers being hired each year would be responsible is equal to 47,500 (*i.e.*, $0.148 \times 320{,}000$).

Over three years, the number of reportable accidents these drivers would be involved in would total 143,000. We assumed for 10 percent of these accidents (or almost 14,300 cases, after rounding), the driver would not be hired as a result. Assuming one accident per driver, we estimate this new data would reverse 14,300 of the 403,000 hiring decisions made each year within the industry. We believe the 10-percent assumption is reasonable, given the importance of accident data in determining insurance rates and forecasting potential liability costs for trucking companies. For example, of the average 445,000 truck-related annual accidents reported in calendar years 1999 and 2000, one percent (or 4,450) were fatal, 22 percent (or 98,000) were injury-related, and 77 percent (or 343,000) were property-damage-only (PDO).[1] Also, FMCSA research into NHTSA's Fatal Accident Reporting System (FARS) database reveals in almost 30 percent of two-vehicle accidents involving a large truck and passenger vehicle, the driver of the truck exhibited behavior that may have contributed to the accident.[2]

Since the literature carefully notes a ''contributing factor'' cannot be equated with crash causation (and FMCSA does not yet have definitive data on crash causation factors), we must assume that in only a certain percentage of these crashes did the truck driver's behavior actually cause the crash. We assume a prospective employer would use ''cause'' as the primary criterion in deciding whether to hire a driver or not. In this analysis, we assumed that in only one-third of these ''contributing factor'' crashes, or 10 percent of all crashes (*i.e.*, ⅓ of 30% of all crashes = 10%), did the truck driver's behavior cause of the crash. In the other two-thirds of ''contributing factor'' crashes, we assumed the truck driver's behavior either did not in fact cause the crash or that further investigation on cause was inconclusive and the driver was hired.) Therefore, in 14,300 of the cases where three years of new accident data would be made available the hiring decisions would be reversed, *i.e.*, the driver would be denied employment. The FMCSA invites comments regarding the accuracy of these assumptions.

Regarding retention costs for this new accident data, employers would be required to store an additional two years of all truck-related accidents, or 890,000 records, at an average of $0.15 per record (according to the Association for Records Management Activities (ARMA)).

Regarding new data reporting requirements for the 419,000 drivers being considered/hired annually within the industry, 143,000 records (47,500 annual accident records × 3 years) will now have to be reported annually by previous employers to prospective employers. Since each inquiry requires a search (whether it yields past accidents or not), 419,000 record searches will have to be completed per year (@ $1.57 per search according the ARMA). For the 143,000 cases where an accident is discovered within the preceding three years, duplication of the record will have to be performed (@ $1.33 per record according to ARMA) and the original record will have to be refiled in the driver's file (@ $1.84 per record according to ARMA). Lastly, we assumed one letter would be mailed (@ $0.37 per letter via first-class mail) for each of the 419,000 driver record searches conducted annually (with the letter either containing the data investigated or a statement indicating that no accidents were found). Multiplying the cost per record for each activity by the number of records handled under each activity, total first-year costs from (a) storing/retaining two additional years of driver accident data, (b) searching/retrieving, duplicating, and refiling three years of accident data in preparation for mailing, and (c) mailing out the information are $1.4 million.

Alcohol and Controlled Substances Test-Related Data

Using data from the 2001 FMCSA Drug and Alcohol Testing Survey, we estimated that an average of 5,100 of the 403,000 drivers hired annually within the industry will fail random and non-random alcohol/controlled substances tests each year and will be referred to a rehabilitation. This proposed rule requires one additional year of such data to be reported to prospective employers on the 419,000 drivers considered/hired annually. Since each inquiry requires a search (whether it yields past data or not), 419,000 record searches will have to be completed per year (@ $1.57 per search according the ARMA). Also, in the 5,100 cases where a violation/referral is discovered for reporting the additional year's results, duplication of the record will have to be performed (@ $1.33 per record according to ARMA) and the original record will have to be refiled in the driver's file (@ $1.84 per record according to ARMA). Lastly, we assumed one letter would be mailed (@ $0.37 per letter via first-class mail) for

[1] ''Large Truck Crash Facts 2000'', Federal Motor Carrier Safety Administration, Analysis Division, March 2002.

[2] ''Large Truck Crash Profile: The 1997 National Picture'', by the Analysis Division, Office of Motor Carriers, Federal Highway Administration, September 1998.

each of the 419,000 driver record searches conducted annually (with the letter either containing the data investigated or a statement indicating that no test/program data were found). Multiplying the cost per record for each activity by the number of records handled under each activity, total first-year costs from: (a) Searching/retrieving, duplicating, and refiling one year of such data in preparation for mailing, and (b) mailing out the information are $0.8 million. Because of cost savings and overlaps with the already existing processes being performed, the actual cost likely could be less.

In this analysis, we estimated that roughly 25 percent (or 1,300) of those 5,100 commercial drivers who fail random or non-random alcohol/controlled substance tests annually, who are referred to rehabilitation programs, and who change employment within the industry each year would now be denied employment because of the new alcohol/controlled substance program data made available to prospective employers. Coupled with the 14,300 we earlier estimated would not be hired because of the new accident data, we have estimated a total of 16,000 commercial driver applicants likely to be denied employment as a result of this proposed rule's implementation. This estimate will be revisited when we estimate accident reduction benefits.

Implicit in parts of the above discussion, where we discussed the number of driver safety performance investigations to be made to previous employers, we assumed one applicant per job and therefore one set of investigations to previous employers per prospective driver, *i.e.,* not multiple drivers applying for one job each being investigated to all previous employers. This is likely an underestimate of the true number of investigations likely to be made to previous employers each year, since in some cases a prospective employer will request safety performance data on more than just one prospective driver. The safety directors in the CDL Effectiveness Focus Group Study (November 1996) reported having to screen many drivers to obtain one good driver to hire. ''It will take 100 applications to find 10 or 20 good ones, and that's good.'' Additionally, some portion of prospective drivers will likely have had more than one previous employer within the last three years, which would further increase the total number of investigations made to previous employers within a given year.

However, FMCSA was not able to estimate with any certainty the number of drivers a prospective employer might consider ''serious candidates'' for a position and for whom safety performance history data would be requested. Additionally, although recent estimates on industry turnover would indicate that across all segments, an average driver would likely be with the same employer for three or more years, it is well reported that some segments have much higher turnover rates. In such segments a prospective driver may have had multiple employers within the past three years. Given the relative uncertainty in these numbers though, we assumed one investigation per position to be filled for the purposes of this evaluation. The agency invites comments regarding the accuracy of these assumptions and encourages commenters to provide data to support their position.

Also, we know that some segments of the industry initiates applications using telephone and other means of communication. As a result, the prospective employer initiates the required inquiries and investigations based on the application before the prospective employer has obtained the signed driver authorization to obtain the drug and alcohol data. Some portion of these drivers will pass the initial screening. They will be asked to provide the signed authorization for the drug and alcohol data.

These second stage screening investigations for possible drug and alcohol data would be to the same previous employers who were investigated for accident and other safety performance history data. We do not have enough data to estimate the additional cost these employers would bear for these multiple investigations for the same driver application.

Costs To Notify Drivers of Rights To Review Data

Under this proposed rule, the § 391.23 investigation into a driver's employment history involves the prospective employer acquiring driver safety performance data from previous employers. Under this rule, data obtained through investigation is defined to include driver accident and alcohol/controlled substances data. For this analysis, we assumed that 419,000 drivers applying for positions would be notified of such rights on their employment applications, or via a simple return letter sent to the driver upon receipt of the application and signed consent form (for the purposes of retrieving accident and alcohol/controlled substances data from previous employers). Since we expect that employers would have to purchase new application forms (including the new/revised information), we used the difference between the current cost of a standard application form (at $0.06 each when purchased from a large office supply distributor) and what we believed would be the cost for the new customized form ($0.12 each). For 419,000 applications, the annual cost to provide this information to applicants is much less than $0.1 million.

We do not have sufficient data to estimate the costs that would be incurred to provide the required notification of driver rights by those employers who initiate the application process by telephone or other such means rather than by a form application. However, such costs would presumably be relatively small. We invite comments on this issue.

Costs Associated With Driver Data Protests

This SNPRM provides that all drivers have the right to review, comment on, and refute the investigative employment data provided by their previous employers to prospective employers. However, those drivers most likely to refute such data are those denied employment as a result of the information. As such, we assume only those drivers who are denied employment as a result of the new data (or 16,000 drivers) would contest their safety performance data provided by a previous employer.

For these 16,000 cases, we assumed two additional hours of labor time spent by each driver to file a request/protest with their previous employer and two additional hours of labor time spent by each previous employer to address each request/protest. We used an average 2001 hourly wage rate for trucking managers of $35.94, obtained from a cost-benefit analysis performed for FMCSA by Moses and Savage, 1993, and updated to 2001 using the GDP Price Deflator. We multiplied this figure by 16,000 cases, yielding total costs to the trucking company to address driver protests of their data files of roughly $1.1 million annually (undiscounted).

As stated, we also assumed the driver would spend two hours filing the protest with the previous employer. Using the 2001 hourly wage rate of $14.66 and 16,000 drivers, this cost adds another $0.5 million to annual total. Lastly, at $0.15 per record filing (using ARMA recordkeeping estimates) and 16,000 cases, filing activities add only $2,300 to this cost. Totaling these three components yields an annual total cost to address driver protests of $1.6 million.

In estimating the driver and employer costs associated with potential protests,

it was unclear how frequently the driver or the employer might secure the services of an attorney to either prosecute or defend against such protests. Presumably the hourly cost of attorneys would exceed the cost assumed for trucking managers of $35.94. If this should occur very often, it could alter the assumed costs. However, because of the uncertainty costs associated with possible attorney services were not included in this analysis. The agency invites comments regarding this approach and encourages commenters to provide data to support their position.

Costs to Prospective Employers To Collect/Review Additional Data

As discussed, the new driver performance data required under this proposed rule would expand the investigative data collection and review process currently being practiced by prospective employers as part of the hiring process. To determine the cost per hiring decision, we estimated the prospective employer's review of driver performance data would be expanded by an additional one-half hour per hiring decision. Using the average 2001 hourly wage rate for a trucking company manager of $35.94 and 320,000 experienced drivers (*i.e.,* those who will have performance histories for these employers to review), total annual costs of this activity amount to $5.8 million (undiscounted).

Costs to Prospective Employers To Interview ''Replacement Hires''

There will also be new costs to prospective employers to interview the approximately 16,000 replacement drivers for those applicants now rejected for positions because of the newly available accident and alcohol/controlled substance data. We assumed one additional hour per prospective employer to interview each ''replacement driver''. At an hourly wage rate of $35.94 per hour per trucking company manager and 16,000 applicants, total annual costs of this activity amount to $0.6 million (undiscounted).

Total Costs

Total first-year costs to implement this proposed rule amount to approximately $10 million (after rounding). Total discounted costs over the 10-year analysis period (2003–2012) are $76 million, using a discount rate of seven percent.

III. Benefits

Societal benefits associated with this proposed rule would accrue from the expected reduction in accidents resulting from the use of safer drivers by industry. Specifically, additional driver safety performance data used in the hiring decision should result in denying positions to the less safe drivers who prior to this proposed rule would have been hired. Additionally, it is reasonable to assume this proposed rule would generate a deterrence effect, since studies of similar social problems and policy approaches have quantified such impacts (*i.e.,* reducing alcohol-related accidents via changes in penalties and public attitudes). In this analysis, we quantified the ''direct'' benefits resulting from a reduction in accidents due to changes in driver hiring decisions. To estimate ''indirect'' benefits associated with a deterrence effect, we conducted a sensitivity analysis by assuming that the benefits from a deterrence effect could range anywhere from zero, 10 percent, 25 percent, or 50 percent of the direct accident reduction benefits associated with this rule.

Benefits Resulting From Newly-Available Accident Data

The first source of direct benefits expected from this proposed rule would occur as a result of trucking company managers using driver accident data from the three preceding years in their hiring decisions. A study conducted by the Volpe Center examined the difference in accident rates for motor carriers with a high number of previous accidents versus those with a low number of previous accidents. We used the results of this study as a proxy for the direct accident reduction potential of this rule, under the logic that if a hiring manager, using the new accident data provided to him under this rule, ends up hiring an applicant with a low previous accident rate (or no accidents in the recent past) in lieu of the applicant with a high previous accident rate, then accident reduction benefits would accrue from this rule.

Using the study conducted by the Volpe National Transportation Systems Center, we discovered that motor carriers identified as high-risk (based on accidents experienced during a 36-month period prior to identification) had a post-identification accident rate of 81.4 accidents per 1000 power units versus only 29.9 accidents per 1000 power units by carriers identified as low-risk (based on the absence of past accidents and hence no Accident Safety Evaluation Area (SEA) score). Under the premise that a motor carrier's accident profile is a direct extension of his drivers' profiles and is a result of that carrier's commercial driver hiring and screening process, then we can use these results to examine differences in drivers.

At a post-identification accident rate difference of 51.5 accidents per 1000 power units between high- and low-risk carriers, we converted this accident rate difference to a per-driver rate by assuming two drivers per power unit on average within the industry (based on information obtained at the Hours-of-Service Roundtables, July 2000). Therefore, the difference in accidents per driver is .026 (*i.e.,* $51.5/(1000 \times 2)$) over the 18-month post-identification analysis period examined in the study. Assuming an equal distribution of this accident involvement differential over the 18-month period following identification, we estimated the annual difference in accidents between drivers with and without accidents within the preceding 18 months to be 0.017 accidents per driver per year. Assuming drivers not hired as a result of this proposed rule would find alternative employment as drivers after an average of six months of searching, the accident reduction differential used to calculate benefits in this analysis was 0.0085 per driver. By using such a conservative estimate (*i.e.,* it is likely that drivers with a high number of past accidents or alcohol/controlled substance violations would find it difficult to secure alternative positions within six months), we are ensuring that our estimates of accident reduction benefits will not be overstated.

Using an average cost per truck-related accident of $79,873 in 2002 dollars (taken from Zaloshnja, Miller, and Spicer, and updated using the Gross Domestic Product (GDP) Price Deflator), we can estimate the value of accident reduction benefits.

In the first year of the analysis period (2003), one year of accident data (or 47,500 accident records) would be available to prospective employers. Based on an assumption that in 10 percent of these cases, the driver hiring decision would be reversed, then 4,750 drivers would be denied employment because of the newly-available accident data. In the second year of the analysis period (2004), two years of accident data (or 95,000 records) are collected on drivers and the number of hiring decisions reversed rises to 9,500 (or 10 percent of the 95,000 records). In 2005 and thereafter, when this proposed rule would be fully implemented, the number of hiring decisions reversed because of the new accident data would rise to 14,300 (or 10 percent of the 143,000 newly-available accident records for the 419,000 experienced drivers hired each year).

At an average cost per accident of $79,873 in 2002 dollars, an accident differential of .0085, and 4,750, 9,500, and 14,300 drivers who are not hired in 2003, 2004, and 2005, respectively, the discounted value of annual accident reduction benefits is equal to $3.3 million in 2003, $6.5 million in 2004, and $9.8 million in 2005 (when three years of data become available to prospective employers). This translates to a total of 41, 81, and 122 accidents avoided in these three years, respectively, as a result of the newly-available accident data. Thereafter, the accident reduction potential (122 accidents) remains the same as that in 2005, the year the accident data retention and reporting requirement would become fully implemented. First-year accident reduction benefits equal $3.3 million, while total discounted accident reduction benefits from the new accident data are equal to $64 million (after rounding) over the 10-year analysis period.

Alcohol and Controlled Substances Data

The second source of direct accident reduction benefits would result from the availability of driver alcohol and controlled substance use and rehabilitation program data by prospective employers. The Motor Carrier Management Information System (MCMIS) contains information on the number of accidents experienced by drivers with and without alcohol or controlled substances citations for the period 1999–2001. Results reveal that the difference in accidents for drivers with and without citations for alcohol and controlled substances violations is .019 accidents per driver over a three-year period (1999–2001). Assuming an equal distribution of accident involvement and driver exposure over this three-year period, the difference in accident profiles between drivers with and without a citation for a serious traffic violation is roughly 0.0633 accidents per driver per year.

As was done with the accident data, we conservatively assumed that drivers who are not hired into positions in any given year because of the new data would be able to find other driver positions after an average of six months of searching. As such, the accident reduction differential used to calculate benefits in this analysis was 0.0316 per driver for new alcohol/controlled substances data.

Recall that we estimated that 1,300 commercial driver applicants would now be denied employment because of the new alcohol/controlled substance program data made available to prospective employers. Using an average cost per truck-related accident of $79,873 and an annual difference in accidents of .0316 per driver, annual benefits associated with this provision equal roughly $3.2 million in 2003. The number of accidents avoided as a result of the new driver alcohol and controlled substance test and program data is equal to 41 accidents each year between 2003 and 2012 (*i.e.*, $0.0316 \times 1{,}280$ drivers). Total discounted accident reduction benefits from the new alcohol/controlled substance test and program data over the 10-year analysis period are estimated to be $24 million.

Benefits From a Deterrence Effect

We believe it is plausible to assume there would be a ''deterrence effect'' associated with this rule, (*i.e.*, where a driver may strive to improve his safety performance record if he knows that such information would be available to prospective employers in future hiring decisions). However, we were unsure as to the specific magnitude of this effect. Therefore, we incorporated a sensitivity analysis framework into this evaluation by assuming that the deterrence effect could range anywhere from zero, 10 percent, 25 percent, or 50 percent of the value of direct accident reduction benefits measured earlier. Since the ''deterrence effect'' benefits are a percentage of the direct accident reduction benefits associated with this rule, they are identified in the next section, where we discuss the total benefits.

Total Benefits

Total benefits associated with this rule are identified in Table 6 and are separated according to our assumptions regarding the magnitude of the deterrence effect associated with this rule.

TABLE 6.—SUMMARY OF BENEFITS, 2003–2012

[In millions of dollars

Benefits scenario	First-year benefits	Total discounted benefits, 10-year analysis period
Direct Benefits Only [1]	$6	$88
With 10% Deterrence Effect [2]	7	97
With 25% Deterrence Effect [2]	8	110
With 50% Deterrence Effect [2]	10	132

[1] Under the ''Direct Benefits Only'' scenario, all truck-related accident reduction benefits result from the industry's refusal to hire drivers with the worst safety performance records.

[2] Under the three benefits scenarios including a ''Deterrence Effect'', FMCSA assumes that the availability of and easier access to new commercial driver safety performance data would result in some drivers improving their driving behavior for fear that prospective employers would now use such data in future hiring decisions. Since we were unsure of the magnitude of this effect, we assessed the deterrence effect at zero, 10, 25, and 50 percent of direct truck-related accident reduction benefits.

First-year (2003) benefits associated with this proposed rule range from slightly less than $6.5 million (rounded down to $6 million in the table) when we assume there is no deterrence effect to almost $10 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits of this rule. Total discounted benefits associated with this rule range from a low of $88 million when we assume no deterrence effect to a high of $132 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits.

IV. Net Benefits

Total discounted net benefits associated with this proposed rule are included in Table 7.

TABLE 7.—SUMMARY OF NET BENEFITS AND BENEFIT-COST RATIOS, 2003–2012

[In millions of dollars]

Benefits scenario	Total discounted net benefits [1]	Benefit-cost ratio [2]
Direct Benefits Only	$12	1.16
With 10% Deterrence Effect	21	1.27
With 25% Deterrence Effect	34	1.45
With 50% Deterrence Effect	56	1.74

[1] Total Discounted Net Benefits were derived by subtracting the Total Discounted Cost estimate of $76 million in Table 3 from each of the Total Discounted Benefits estimates in Column 3 of Table 4. For example, subtracting the $76 million in total discounted costs from Table 2 by the $88 million in Total Discounted Benefits under the ''Direct Benefits Only'' scenario of Table 4 yields Total Net Discounted Benefits of $12 million over the 10-year analysis period (2003–2012) examined here.

[2] Benefit-Cost Ratios were derived by dividing the Total Discounted Cost estimate of $76 million in Table 3 from each of the Total Discounted Benefits estimates for each of the Benefits Scenarios located in Column 3 of Table 4. For example, dividing the $88 million in Total Discounted Benefits under the ''Direct Benefits Only'' scenario of Table 4 by the $76 million in total discounted costs from Table 3 yields a Benefit-Cost Ratio of 1.16 over the 10-year analysis period (2003–2012) examined here. A benefit-cost ratio of greater than one implies that the rule is cost effective to implement when comparing costs to benefits within the 10-year analysis period.

Total net discounted benefits associated with this rule over the 10-year analysis period range from a low of $12 million when we assume no deterrence effect benefits, to a high of $56 million when we assume the magnitude of the deterrence effect is equal to 50 percent of the direct accident reduction benefits associated with the rule. Correspondingly, benefit-cost ratios range from a low of 1.16 when we assume no deterrence effect benefits to a high of 1.74 when deterrence effect benefits are assumed to equal 50 percent of direct accident reduction benefits.

List of Subjects

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Reporting and recordkeeping requirements, Safety.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety.

In consideration of the foregoing, the FMCSA proposes to amend title 49 CFR chapter III, parts 390, and 391 as set forth below:

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL [AMENDED]

1. The authority citation for 49 CFR part 390 is revised to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31502, 31504, and sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

2. Section 390.15 is amended by revising paragraphs (a), (b), introductory text and by adding paragraph (c) to read as follows:

§ 390.15 Assistance in investigations and special studies.

(a) A motor carrier must make all records and information pertaining to an accident available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration upon request or as part of any investigation within such time as the request or investigation may specify. A motor carrier shall give an authorized representative of the Federal Motor Carrier Safety Administration all reasonable assistance in the investigation of any accident including providing a full, true and correct response to any question of the inquiry.

(b) For accidents that occur after [Insert date one year prior to the effective date of the final rule.], motor carriers must maintain an accident register containing at least the information required by paragraphs (b)(1) and (b)(2) of this section and retain that information for three years after the date of each accident. For accidents that occurred on or prior to [Insert date one year prior to the effective date of the final rule.], motor carriers must retain the record containing at least the information required by paragraphs (b)(1) and (b)(2) of this section in the accident register for a period of one year after an accident occurred.

* * * * *

(c) Within 30 days after receiving a request for information about a former driver's accident record from his/her new or prospective employer, a motor carrier must transmit the information listed in paragraph (b)(1) of this section for all accidents contained in the accident register involving that driver that occurred after [Insert date one year prior to the effective date of the final rule.] .

PART 391—QUALIFICATIONS OF DRIVERS [AMENDED]

3. The authority citation for 49 CFR part 391 is revised to read as follows:

Authority: 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; Sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; and 49 CFR 1.73.

4. In §391.21, paragraphs (b)(10) and (d) are revised to read as follows:

§ 391.21 Application for employment.

* * * * *

(b) * * *

(10)(i) A list of the names and addresses of the applicant's employers during the 3 years preceding the date the application is submitted,

(ii) The dates he or she was employed by that employer,

(iii) Whether the job was a safety-sensitive function as defined under § 382.107, and thus subject to alcohol and controlled substances testing under 49 CFR part 382, and

(iv) The reason for leaving the employ of that employer;

* * * * *

(d) Before an application is submitted, the motor carrier must inform the applicant that the information he/she provides in accordance with paragraph (b)(10) of this section may be used, and the applicant's previous employers will be contacted, for the purpose of investigating the applicant's background as required by § 391.23(c). The prospective employer must also notify the driver in writing of due process rights as specified in § 391.23(i) regarding information received as a result of the investigations required by § 391.23(c).

5. In § 391.23, revise paragraph (c) and add new paragraphs (d) through (m) to read as follows:

§ 391.23 Investigations and inquiries.

* * * * *

(c) The investigation of the driver's employment record required by paragraph (a)(2) of this section must be completed within 30 days of the date the driver's employment begins. The investigation may consist of personal interviews, telephone interviews, letters, or any other method for investigating that the carrier deems appropriate. Each motor carrier must make a written record with respect to each previous employer contacted. The record must include the previous employer's name and address, the date the previous employer was contacted, and the information provided about the driver. The record must be maintained pursuant to § 391.53.

(d) The motor carrier must investigate, at a minimum, the information listed in this paragraph from all previous employers that employed the driver to operate a CMV within the previous three years:

(1) General information about a driver's employment record;

(2) (i) Any accidents, as defined by § 390.5 of this subchapter, involving the driver that occurred in the three-year period preceding the date of the employment application. The specific information to be sought regarding any accident is described in § 390.15(b)(1) of this chapter.

(ii) Exception. Until [Insert date two years after the effective date of the final rule.] carriers need only provide information for accidents that occurred after [Insert date one year prior to the effective date of the final rule.].

(e) The motor carrier must investigate the information listed below in this paragraph from all previous employers that employed the driver within the previous three years in a safety-sensitive function, as defined under § 382.107 of this chapter, that required controlled substance and alcohol testing pursuant to part 382 of this chapter:

(1) Whether, within the previous three years, the driver had violated the alcohol and controlled substances prohibitions under subpart B of part 382 of this chapter.

(2) For a driver reported pursuant to paragraph (e)(1) of this section, whether the driver failed to undertake or complete a rehabilitation program prescribed by a substance abuse professional (SAP) pursuant to § 382.605 of this chapter. If the previous employer does not know this information (*e.g.*, an employer that terminated an employee who tested positive on a drug test), the prospective motor carrier must obtain documentation of the driver's successful completion of the SAP's referral directly from the driver.

(3) For a driver reported pursuant to paragraph (e)(1) of this section who had successfully completed a SAP's rehabilitation referral, and remained in the employ of the referring employer, information on whether the driver had the following testing violations subsequent to completion of a § 382.605 referral:

(i) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(ii) Verified positive drug tests;

(iii) Refusals to be tested (including verified adulterated or substituted drug test results).

(f) A prospective motor carrier must provide to the previous motor carrier the driver's written consent for the release of the information in paragraph (e) of this section. If the driver refuses to provide this written consent, the prospective motor carrier must not permit the driver to operate a commercial motor vehicle for that motor carrier.

(g) Previous employers must respond to requests for the information in paragraphs (d) and (e) of this section within 30 days after the request is received. The previous employer must take all precautions reasonably necessary to ensure the accuracy of the records.

(h) The release of information under this section may take any form that reasonably ensures confidentiality, including letter, facsimile, or e-mail. The previous employer and its agents and insurers must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in forwarding the records, except the previous employer's insurer.

(i)(1) The prospective employer must expressly notify the driver—via the application form or other written document—that he or she has the following rights regarding the investigative information provided to the prospective employer pursuant to paragraphs (d) and (e) of this section:

(i) The right to review information provided by previous employers;

(ii) The right to have errors in the information corrected by the providing previous employer and for that previous employer to re-send the corrected information to the prospective employer;

(iii) The right to have a rebuttal statement attached to the alleged erroneous information, if the submitting previous employer disagrees with the driver that the information is incorrect.

(2) Drivers wishing to review previous employer-provided investigative information must submit a written request to the prospective employer. The prospective employer must provide this information to the applicant within two (2) business days. If the prospective employer has not yet received the requested information from the previous employer(s), then the two-business days deadline will begin when the prospective employer receives the requested information. If the driver has not arranged to pick up or receive the requested records within thirty (30) days, the prospective motor carrier may consider the driver to have waived his/her request to review the records.

(j)(1) Drivers wishing to correct erroneous information in records provided pursuant to paragraphs (d) and (e) of this section must send the allegation of error, proof of error, and request to correct, to the previous employer who provided the records to the prospective employer.

(2) If the previous employer and the driver agree the information in question is erroneous, the previous employer must correct the information and, within thirty (30) business days after receiving the driver's allegation/proof/request to correct, must send the corrected information to the prospective employer. The previous employer must also retain the corrected information for providing to subsequent prospective employers when requests for this information are received.

(3) If the previous employer and the driver cannot agree the information in question is erroneous, then the previous employer must accept a rebuttal from the driver, if he/or she wishes to provide one, and within thirty (30) business days after receiving the driver's allegation/proof/request to correct, must send a copy of the driver's rebuttal to the prospective employer. The previous employer must append the driver's rebuttal to the information in its file and provide the complete appended information to any subsequent investigating prospective employer.

(k)(1) The prospective employer must use the information described in paragraphs (d) and (e) of this section only to decide whether to hire the driver who is the subject of those records.

(2) The prospective employer and its agents and insurers must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in deciding whether to hire the driver, except that disclosure (excluding any alcohol or controlled substances information) may be made to the prospective employer's insurer for the purpose of determining whether to include the driver on carrier insurance.

(l)(1) No action or proceeding for defamation, invasion of privacy, or

interference with a contract that is based on the furnishing or use of information in accordance with this section may be brought against—

(i) A motor carrier investigating the information, described in paragraphs (d) and (e) of this section, of an individual under consideration for employment as a commercial motor vehicle driver,

(ii) A person who has provided such information; or

(iii) The agents or insurers of a person described in paragraph (l)(1) or (l)(2) of this section, except insurers are not granted a limitation on liability for any alcohol and controlled substance information.

(2) The protections in paragraph (l) of this section do not apply to persons who knowingly furnish false information, or who are not in compliance with the procedures specified for these investigations.

6. In § 391.51, paragraph (b)(2) is revised to read as follows:

§ 391.51 General requirements for driver qualification files.

* * * * *

(b) * * *

(2) A copy of the response by each State agency concerning a driver's driving record pursuant to § 391.23(a)(1);

* * * * *

7. Add a new § 391.53 to read as follows:

§ 391.53 Driver Employment History File.

(a) Each motor carrier must maintain records relating to the investigation into the employment history of a new or prospective driver pursuant to paragraphs (d) and (e) of this section. This file must be maintained in a secure location with controlled access.

(1) The motor carrier must ensure that access to this data is limited to those who are involved in the hiring decision or who control access to the data. In addition, the motor carrier's insurer may have access to the data (except the alcohol and controlled substances data) for the purpose of determining whether to include the driver on the carrier's insurance policy.

(2) This data must only be used for the hiring decision.

(b) The file must include:

(1) A copy of the driver's written authorization for the motor carrier to seek information about a driver's drug and alcohol history as required under § 391.23(d).

(2) A copy of the response(s) received to request for information under paragraphs (d) and (e) of § 391.23 from each previous employer, or documentation of a good faith effort to contact them. The record must include the previous employer's name and address, the date the previous employer was contacted, and the information provided about the driver.

(c)(1) The record for a driver who is hired must be retained for as long as the driver is employed by that motor carrier and for three years thereafter.

(2) The record for a driver who is not hired must be retained for one year.

(d) A motor carrier shall make all records and information in this file available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration or an authorized State or local enforcement agency representative, upon request or as part of any inquiry within the time period specified by the requesting representative.

Issued on: July 11, 2003.

Annette M. Sandberg,

Acting Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 697

[I.D. 070203E]

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Application for Exempted Fishing Permit (EFP)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of a request for an EFP to harvest horseshoe crabs; request for comments.

SUMMARY: NMFS announces that the Director, Office of Sustainable Fisheries, is considering issuing an EFP to Limuli Laboratories of Cape May Court House, NJ to conduct a third year of an exempted fishing operation otherwise restricted by regulations prohibiting the harvest of horseshoe crabs in the Carl N. Schuster Jr. Horseshoe Crab Reserve (Reserve) located 3 nautical miles (nm) seaward of the mouth of Delaware Bay. NMFS is considering issuing an EFP for the harvest of 10,000 horseshoe crabs for biomedical purposes and requiring as a condition of the EFP the collection of data related to the status of Delaware Bay horseshoe crabs within the Reserve. Therefore, this document invites comments on the issuance of an EFP to Limuli Laboratories.

DATES: Comments on this action must be received on or before August 1, 2003.

ADDRESSES: Written comments should be sent to John H. Dunnigan, Director, Office of Sustainable Fisheries, NMFS, 1315 East West Highway, Room 13362, Silver Spring, MD 20910. Mark the outside of the envelope ''Comments on Horseshoe Crab EFP Proposal.'' Comments may also be sent via facsimile (fax) to (301) 713–0596. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Tom Meyer, Fishery Management Biologist, (301) 713–2334.

SUPPLEMENTARY INFORMATION:

Background

The regulations that govern exempted fishing, at 50 CFR 600.745(b) and 697.22 allow a Regional Administrator or the Director of the Office of Sustainable Fisheries to authorize for limited testing, public display, data collection, exploration, health and safety, environmental clean-up and/or hazardous removal purposes, the targeting or incidental harvest of managed species that would otherwise be prohibited. An EFP to authorize such activity may be issued, provided there is adequate opportunity for the public to comment on the EFP application, the conservation goals and objectives of the fishery management plan are not compromised, and issuance of the EFP is beneficial to the management of the species.

The Reserve was established on February 5, 2001 (66 FR 8906), to provide protection for the Atlantic coast stock of horseshoe crabs, and to promote the effectiveness of the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan (ISFMP) for horseshoe crab. The final rule prohibited fishing for horseshoe crabs in the Reserve and the possession of horseshoe crabs on a vessel with a trawl or dredge aboard while in the Reserve. The rule did not allow for any biomedical harvest or the collection of fishery dependent data. However, in the comments and responses section, NMFS stated that it would consider issuing EFPs for the biomedical harvest of horseshoe crabs from the Reserve.

The biomedical industry collects horseshoe crabs, removes approximately 30 percent of their blood, and returns them alive to the water. Approximately 10 percent do not survive the bleeding process. The blood contains a reagent called Limulus Amebocyte Lysate (LAL)

that is used to test injectable drugs and medical devices for bacteria and bacterial by-products. Presently, there is no alternative to LAL derived from the horseshoe crab.

NMFS manages horseshoe crabs in the exclusive economic zone in close cooperation with the Commission. The Commission's Horseshoe Crab Management Board met on April 21, 2000, and recommended that biomedical companies with a history of collecting horseshoe crabs in the Reserve be given an exemption to continue their historic levels of collection not to exceed a combined harvest total of 10,000 crabs annually. The Commission's Horseshoe Crab Plan Review Team has reported that biomedical harvest of up to 10,000 horseshoe crabs should be allowed to continue in the Reserve given that the resulting mortality should be only about 1,000 horseshoe crabs (10 percent mortality during bleeding process). Also, the Commission's Horseshoe Crab Stock Assessment Committee Chairman recommended that, in order to protect the Delaware Bay horseshoe crab population from over-harvest or excessive collection mortality, no more than a maximum of 20,000 horseshoe crabs should be collected for biomedical purposes from the Reserve. In addition to the direct mortality of horseshoe crabs that are bled, it can be expected that more than 20,000 horseshoe crabs will be trawled up and examined for LAL processing. This is because horseshoe crab trawl catches usually include varied sizes of horseshoe crabs and large female horseshoe crabs are the ones selected for LAL processing. The unharvested horseshoe crabs are released at sea with some unknown amount of mortality, but this mortality is expected to be negligible.

Collection of horseshoe crabs for biomedical purposes from the Reserve is necessary because of the low numbers of horseshoe crabs found in other areas along the New Jersey Coast from July through October and in light of the critical role horseshoe crab blood plays in proper health care. In conjunction with the biomedical harvest, NMFS is considering requiring that scientific data be collected from the horseshoe crabs taken in the Reserve as a condition of receiving an EFP. Since the Reserve was established on February 5, 2001, the only fishery data from this area were collected under EFPs issued to Limuli Laboratories on September 28, 2001, which allowed collections until October 31, 2001, and on August 1, 2002, which allowed collections until October 31, 2002, and under Scientific Research Activity Permits issued to Dr. Jim Berkson, Virginia Polytechnic Institute and State University's Department of Fisheries and Wildlife Science on September 4, 2001 (for collections from September 1–October 31, 200l) and on September 24, 2002 (for collections from September 24–November 15, 2002). Further data are needed to improve the understanding of the horseshoe crab population in the Delaware Bay area and to better manage the horseshoe crab resource under the cooperative state/Federal management program. The information collected through the EFP will be provided to NMFS, the Commission and to the State of New Jersey.

Results of Previous Year's EFP

Limuli Laboratories applied for an EFP to collect horseshoe crabs for biomedical and data collection purposes from the Reserve, in 2002. The EFP application specified that: (1) The same methods would be used in 2002 as in 2001, (2) 10 percent of the bled horseshoe crabs would be tagged, and (3) there had not been any sighting or capture of marine mammals or endangered species in the trawling nets of fishing vessels engaged in the collection of horseshoe crabs, since 1993. An EFP was issued to Limuli Laboratories on August 1, 2002, which allowed them to collect horseshoe crabs until October 31, 2002, in the Reserve. A total of 1,012 horseshoe crabs were collected for the manufacture of LAL. The horseshoe crabs were collected on 11 dates (4 days in August and 7 days in September), transported to the laboratory for the bleeding operation and inspected for sex, size, injuries and responsiveness. Three to four tows were conducted during each fishing trip with the tows lasting no more than 30 minutes to avoid impacting loggerhead turtles. Horseshoe crabs were unloaded and transported to the laboratory by truck. The average sex ratio for the landings was 0.85 males per females, similar to last year's ratio of 0.88. Horseshoe crabs injured during transport and handling numbered 115 or 11.4 percent of the total while 31 horseshoe crabs or 3.1 percent were noted as unresponsive (presumed dead). Therefore, 866 healthy, uninjured crabs were available for LAL processing. Since large horseshoe crabs, which are generally females, are used for LAL processing, most were females. Of those 866 processed for LAL, 200 female crabs were measured (inter-ocular distances and prosoma widths), weighed, aged, and tagged to establish baseline morphometrics and ages, prior to being released. Healed injuries were found on 21.5 percent of the crabs examined in 2002, compared to 30 percent in 2001. More than half of those injuries were broken or worn telsons. Most of the healed injuries were the result of spawning attachments.

Horseshoe crabs were aged in 6 categories using Dr. Carl N. Schuster Jr.'s criteria of aging by appearance: First year or virgin, young, young/medium, medium, medium/old and old age. In 2002, animals were categorized as five percent virgin females, 68 percent young animals, 25 percent young/medium and medium, combined, and 2 percent medium/old and old, combined. This finding supports the basis for the Reserve which was established to protect young horseshoe crabs. The average measurements for the female horseshoe crabs (no males were measured) were 168.10 mm for the inter-ocular distance, 270.93 mm for the prosoma width and 2.5 kg for weight. These averages are slightly higher than seen in 2001. The horseshoe crabs were rated on an activity scale of from one to three, with three being the most active. The vast majority of the 200 that were observed were active (194), with 185 falling in category two and nine in category three. Only six crabs exhibited no movement on the scale and were rated as one. Tagged crabs were released at the water's edge on Highs Beach, New Jersey. The beach was checked frequently, following release, to ensure the crabs had returned to the water.

A total of 450 horseshoe crabs from the Reserve were tagged and released during 2001 and 2002. Nine of the 200 horseshoe crabs tagged in 2001 have been recovered. Of those, 6 crabs were found alive and 3 were found dead. All but one of the live recoveries occurred during the 2002 spawning season. The 3 crab mortalities may have been a consequence of spawning.

Data collected under the EFP were supplied to NOAA Fisheries, the Commission, and the State of New Jersey.

Proposed EFP

Limuli Laboratories proposes to conduct a third year of the study using the same means and methods used during years one and two, as described below under terms and conditions.

The proposed EFP would exempt two commercial vessels from regulations at 50 CFR 697.7(e), which prohibit fishing for horseshoe crabs in the Reserve described in § 697.23(f)(1) and prohibit possession of horseshoe crabs on a vessel with a trawl or dredge aboard in the same Reserve.

Limuli Laboratories, in cooperation with the State of New Jersey's Division of Fish and Wildlife, submitted an

application for an EFP on June 26, 2003. NMFS has made a preliminary determination that the subject EFP contains all the required information and warrants further consideration. NMFS has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Federal horseshoe crab regulations and the Commission's Horseshoe Crab ISFMP.

Regulations at 50 CFR 600.745(b)(3)(v) authorize NMFS to attach terms and conditions to the EFP consistent with the purpose of the exempted fishery, the objectives of the horseshoe crab regulations and fisheries management plan, and other applicable law. NMFS is considering terms and conditions such as:

(1) Limiting the number of horseshoe crabs collected in the Reserve to no more than 500 per day and to a total of no more than 10,000 per year;

(2) Requiring collection under an EFP to take place over a total of approximately 20 days during the months of July, August, September, and October. Horseshoe crabs are readily available in harvestable concentrations nearshore earlier in the year, and offshore in the Reserve during July through October;

(3) Requiring a 5 and one-half inch (14.0 cm) flounder net to be used by the vessel to collect the horseshoe crabs. This condition would allow for continuation of traditional harvest gear and adds to the consistency in the way horseshoe crabs are harvested for data collection;

(4) Limiting trawl tow times to 30 minutes as a conservation measure to protect sea turtles, which are expected to be migrating through the area during the collection period, and are vulnerable to bottom trawling;

(5) Restricting the hours of fishing to daylight hours only, approximately from 7:30 a.m. to 5 p.m. to aid law enforcement. NMFS also is considering a requirement that the State of New Jersey Law Enforcement be notified daily when and where the collection will take place; and

(6) Requiring that the collected horseshoe crabs be picked up from the fishing vessels at docks in the Cape May Area and transported to local laboratories, bled for LAL, and released alive the following morning into Lower Delaware Bay.

Also as part of the terms and conditions of the EFP, for all horseshoe crabs bled for LAL, NMFS is considering a requirement that the EFP holder provide information on sex ratio and daily numbers, and tag 10 percent of the horseshoe crabs harvested. Also, the EFP holder may be required to examine at least 200 horseshoe crabs for:

a. Morphometric data, by sex—*e.g.* interocular (I/O) distance and weight, and

b. Level of activity, as measured by a response or by distance traveled after release on a beach.

Based on the results of this EFP, this action may lead to future rulemaking.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 11, 2003.

John H. Dunnigan,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 03–18104 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 68, No. 137
Thursday, July 17, 2003

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service

Native American Outreach Program: Request for Applications and Request for Input

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Notice of request for applications and request for input.

SUMMARY: The Cooperative State Research, Education, and Extension Service (CSREES) requests applications for the Native American Outreach Program for fiscal year (FY) 2003 to develop and deliver outreach activities that will inform Native American farmers and ranchers, tribal governments, tribal communities, and Tribal Colleges and Universities (TCU) about the availability of, and encourage their participation in, USDA programs.

DATES: Applications must be received by close of business (COB) on August 18, 2003 (5 p.m. Eastern Daylight Time). Applications received after this deadline will not be considered for funding. Comments regarding this RFA are requested within three months from the issuance of this notice. Comments received after that date will be considered to the extent practicable.

ADDRESSES: The address for hand-delivered applications or applications submitted using an express mail or overnight courier service is: Native American Outreach Program; c/o Proposal Services Unit; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; Room 1420, Waterfront Centre; 800 9th Street, SW., Washington, DC 20024; Telephone: (202) 401–5048.

Applications sent via the U.S. Postal Service must be sent to the following address: Native American Outreach Program; c/o Proposal Services Unit; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; STOP 2245; 1400 Independence Avenue, SW., Washington, DC 20250–2245.

Written stakeholder comments should be submitted by mail to: Policy and Program Liaison Staff; Office of Extramural Programs; USDA–CSREES; STOP 2299; 1400 Independence Avenue, SW., Washington, DC 20250–2299; or via e-mail to: *Rfp-Oep@csrees.usda.gov*. (This e-mail address is intended only for receiving comments regarding this RFA and not requesting information or forms.) In your comments, please state that you are responding to the Native American Outreach Program RFA.

FOR FURTHER INFORMATION CONTACT: Diana Jerkins; Program Director; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; STOP 2243; 1400 Independence Avenue, SW., Washington, DC 20250–2243; Telephone: (202) 401–6996; Fax: (202) 401–6488; e-mail: *djerkins@csrees.usda.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

Stakeholder Input

CSREES is requesting comments regarding this RFA from any interested party. These comments will be considered in the development of any subsequent RFA for the program. Such comments will be used to meet the requirements of section 103(c)(2) of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. 7613(c)(2)). This section requires the Secretary to solicit and consider input on a current RFA from persons who conduct or use agricultural research, extension and education for use in formulating future RFAs for competitive programs. Comments should be submitted as provided in the **ADDRESSES** and **DATES** portions of this announcement.

Catalog of Federal Domestic Assistance

This is a new program listed in the Catalog of Federal Domestic Assistance that is authorized under the same legislation as 10.443, Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers.

Part I. General

A. Legislative Authority and Background

Section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended, (7 U.S.C. 2279(a)) authorizes the Secretary to make grants to eligible institutions and organizations so that they may provide outreach and technical assistance to encourage and assist socially disadvantaged farmers and ranchers to own and operate farms and ranches and to participate equitably in the full range of agricultural programs offered by the Department. This assistance shall enhance coordination of the outreach, technical assistance, and education efforts authorized under various agriculture programs and include information on and assistance with commodity, conservation, credit, rural, and business development programs, application and bidding procedures, farm and risk management, marketing

and other activities essential to participation in agricultural and other programs of the Department.

Paragraph (3)(A) of section 2501(a) authorizes the Secretary to make grants to, and enter into contracts and other agreements with, an eligible entity to provide information and technical assistance under this subsection. In addition, paragraph (4)(B) of section 2501(a) authorizes any agency of the Department to participate in any grant, contract, or agreement entered into under this subsection by contributing funds, if the agency determines that the objectives of the grant will further the authorized programs of the contributing agency.

B. Purpose, Priorities and Fund Availability

The purpose of the Native American Outreach Program conducted under section 2501(a) is to develop and deliver outreach activities that will inform Native American farmers and ranchers, tribal governments, tribal communities, and Tribal Colleges and Universities (TCU) about the availability of, and encourage participation in, USDA programs. Proposals must target outreach and technical assistance efforts to Native American communities. Native American refers to a member of a federally recognized American Indian tribe, band, group, or Nation, including Alaska Indians, Aleuts, Eskimos and Alaska native villages of the United States.

Proposed projects may address one, some, or all four (4) of the objectives described below; however, priority will be given to proposals that address more than one of the objectives and/or serve to cover the broadest geographic representation for Native American communities:

1. Enhance education campaigns directed to Native American producers, tribal governments, tribal communities, and TCU for program delivery opportunities available through USDA agencies;

2. Provide additional education and knowledge about USDA supported programs and opportunities to potential participants in Native American communities;

3. Work with educational organizations to enhance capacity development in the food and agricultural sciences in order to provide Native Americans additional information regarding program delivery and career opportunities;

4. Provide tribal governments information about USDA programs for plant and animal safeguards internally and on border lands in support of homeland security.

Funded projects need not be national in scope; however, grantees will be expected to coordinate their efforts and establish appropriate linkages with other grantees, where feasible, to advance progress in accomplishing all four (4) objectives. There is no commitment by USDA to fund any particular application or to make a specific number of awards. In FY 2003, USDA anticipates that approximately $600,000 will be available to fund applications submitted in response to this RFA. Funds for this activity have been provided by six mission areas of USDA: Marketing and Regulatory Programs (MRP); Research, Education and Economics (REE); Rural Development (RD); Food Safety (FS); Farm and Foreign Agricultural Services (FFAS); and Natural Resources and Environment (NRE).

C. Eligibility

Applications may be submitted by:

1. An Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b)) or a national tribal organization that has demonstrated experience in providing agriculture education or other agriculturally related services to Native American farmers and ranchers in a region.

2. Any community-based organization, network, or coalition of community-based organizations that:

(a) Has demonstrated experience in providing agricultural education or other agriculturally related services to Native American farmers and ranchers;

(b) Has provided to the Secretary documentary evidence of work with Native American farmers and ranchers during the two-year period preceding the submission of an application for assistance under this program (documentary evidence shall include a narrative providing specific information regarding: the scope of past projects, including the number of Native American farmers and ranchers served or in the area served by the organization; activities conducted; community involvement; and copies of prior agreements, press releases, news articles, and other contemporaneous documents supporting the narrative); and

(c) does not engage in activities prohibited under section 501(c)(3) of the Internal Revenue Code of 1986 (see part III, B., 17. for certification requirement).

3. An 1890 institution or 1994 institution (as defined in section 2 of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. 7601)), including West Virginia State College.

4. An Indian Tribal Community College or an Alaska Native Cooperative College.

5. An Hispanic-serving institution (as defined in section 1404 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (7 U.S.C. 3103)).

6. Any other institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) that has demonstrated experience in providing agriculture education or other agriculturally related services to Native American farmers and ranchers in a region.

7. An organization or institution that received funding under the Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers Competitive Grants Program (OASDFR) before January 1, 1996, but only with respect to projects that the Secretary considers are similar to projects previously carried out by the organization or institution under the OASDFR.

Award recipients may subcontract to organizations not eligible to apply provided such organizations are necessary for the conduct of the project; however, applications will be evaluated based on the qualifications of key project personnel so these participants' roles and responsibilities must be detailed.

D. Indirect Costs

Pursuant to section 1462 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3310), indirect costs for this program are limited to 19 percent of the total Federal funds provided under each award. Therefore, the recovery of indirect costs under this program may not exceed the lesser of the institution's official negotiated indirect cost rate or the equivalent of 19 percent of total Federal funds awarded. Another method of calculating the maximum allowable is 23.456 percent of the total direct costs. (This limitation also applies to the recovery of indirect costs by any subawardee or subcontractor, and should be reflected in the subrecipient budget.) If no rate has been negotiated, a reasonable dollar amount (equivalent to or less than 19 percent of total Federal funds requested) in lieu of indirect costs may be requested, subject to approval by USDA. This same indirect cost limitation applies to subcontracts.

E. Matching Requirements

There is no requirement for award recipients to provide matching funds under this program.

F. Funding Restrictions

Program funds may not be used for the renovation or refurbishment of research, education or extension space; the purchase or installation of fixed equipment in such space; or the planning, repair, rehabilitation, acquisition, or construction of buildings or facilities.

G. Types of Applications

All applications submitted in response to this RFA will be new applications. All applications will be reviewed competitively using the selection process and evaluation criteria described in part IV, Review Process.

Part II. Program Description

A. Project Types

In FY 2003, CSREES anticipates making one to three grants. Applicants may propose project budgets of up to $600,000. However, applicants should factor into their request the number of objectives they propose to address, recognizing that USDA will endeavor to make progress toward accomplishing all four (4) objectives (described in part I, B.) and achieving national representation with these funds. Project periods may not exceed eighteen (18) months.

B. Program Description

Proposed projects may address one, some, or all four (4) of the objectives described in part I, B.; however, priority will be given to proposals that address more than one of these objectives and/or serve to cover the broadest geographic representation for Native American communities.

The purpose of the Native American Outreach Program is to develop and deliver outreach activities that will inform Native American farmers and ranchers, tribal governments, tribal communities, and TCU about the availability of, and encourage their participation in, USDA programs. Funded projects need not be national in scope; however, grantees will be expected to coordinate their efforts and establish appropriate linkages with other grantees, where feasible, to advance progress in accomplishing all four (4) objectives.

Proposals must target outreach and technical assistance efforts to Native American communities. Native American refers to a member of a federally recognized American Indian tribe, band, group, or Nation, including Alaska Indians, Aleuts, Eskimos and Alaska native villages of the United States. Applicants must describe their plans to involve stakeholders in identifying needs and evaluating the success of the project in meeting those needs. Applicants also must submit management plans that explain how the project will be managed to ensure efficient administration of the grant.

Applications must incorporate a project evaluation component that will permit a qualitative and quantitative assessment of expected project impacts (*see* part III, B., 5.). Depending on project objectives, the following performance indicators could be utilized:

1. Increased number of workshops and/or training opportunities directed to increase collaboration between USDA agencies and Native Americans;

2. Increased participation among Native American people in farm, risk management and conservation programs offered by the USDA;

3. Increased number of education/outreach demonstration projects and/or an increase in the number of exchange programs between Native American educational organizations and USDA; and

4. Increased contact with Native Americans regarding emergency planning for preparedness and security for a safe food supply.

Applicants addressing project objectives 1 and/or 2 (as described in part I, B.) should provide a brief synopsis of the program(s) they are incorporating in their proposed projects. These can include, but are not limited to: The various farm and risk management programs that encourage producers with both cropping and livestock operations to adopt agriculture practices that can increase profitability; the various conservation programs and technical assistance provided by local Natural Resources Conservation Service offices that can help Native American producers better manage their natural resources through voluntary incentive-based approaches; USDA services and technical expertise designed to help producers gain an understanding of economically injurious plant and animal diseases; programs to identify and solve farm, home, and community problems through education and technical assistance; services designed to increase understanding of the role and opportunities for forest dependent rural communities; programs to improve market access opportunities for agricultural products in emerging markets; programs that aid in the development of infrastructure needs for rural communities; and the facilitation of participation in the national Agricultural Census.

Applicants addressing project objective 3 (as described in part I, B.) should provide a brief synopsis of the program(s) they are incorporating into their proposed projects. Funded activities could include, but are not limited to: Using food and agricultural sciences programs available at educational institutions to help deliver enhanced USDA program information; creating exchange programs between institutions and USDA staff to enhance capacity of education programs in the food and agricultural sciences; and providing information on career opportunities within USDA or other state, Federal, or tribal governments to graduates of such accredited programs.

Examples of outreach activities that could be funded as part of project objective 4 (as described in part I, B.) include, but are not limited to: Distributing to Native American farmers and ranchers documents that remind them of the steps they can take to secure their operations, and discussing these documents with them; updating Native American farmers and ranchers about security efforts for disaster reporting; and providing Native American farmers and ranchers with Foreign Animal Disease Awareness Training seminars.

Pertinent USDA agricultural programs include but are not limited to the following, identified by their Catalog of Federal Domestic Assistance title and number: Plant and Animal Care (10.025); Emergency Conservation Program (10.054); Production and Flexibility Payments for Contract Commodities (10.055); Forestry Incentives Program (10.064); Conservation Reserve Program (10.069); Wetlands Reserve Program (10.072); Tribal College Equity, Endowment and Research (10.221, 10.222, and 10.227); Homeland Security—Agriculture (10.304); Noninsured Assistance (10.451); Cooperative Extension Service (10.500); Emerging Markets Program (10.603); Rural Business Enterprise Grants (10.769); Soil Survey (10.903); Environmental Quality Incentives Program (10.912); Farmland Protection Program (10.913); Wildlife Habitat Incentives Program (10.914); Agricultural Statistics Reports (10.950); and Grasslands Reserve Program.

On a semi-annual basis, grantees must submit progress reports to CSREES. In addition, grantees must participate in at least two national meetings of Native Americans, to be agreed upon in consultation with CSREES, which will serve to highlight their active participation in outreach and

information delivery to the Native American community. Reasonable travel expenses for at least one member of the project team to attend these meetings and for an appropriate number of personnel to attend a post-award meeting with CSREES may be requested as part of the project budget (*see* part III, B., 12.). Part VI, C. contains additional information about these requirements.

Part III. Preparation of an Application

A. Program Application Materials

Program application materials are available at the CSREES Funding Opportunities Web site (*http://www.reeusda.gov/1700/funding/ourfund.htm*). If you do not have access to the Web page or have trouble downloading material and you would like a hard copy, you may contact the Proposal Services Unit, Competitive Programs, USDA/CSREES at (202) 401–5048. When calling the Proposal Services Unit, please indicate that you are requesting the RFA and associated application forms for the Native American Outreach Program. These materials also may be requested via Internet by sending a message with your name, mailing address (not e-mail) and phone number to *psb@reeusda.gov.* State that you want a copy of the RFA and the associated application forms for the Native American Outreach Program.

B. Content of Applications

The applications should be prepared following the guidelines and the instructions below. Each application must contain the following elements in the order indicated:

1. General

Use the following guidelines to prepare an application. Proper preparation of applications will assist reviewers in evaluating the merits of each application in a systematic, consistent fashion:

(a) Prepare the application on only one side of the page using standard size (8½″ x 11″) white paper, one-inch margins, typed or word processed using no type smaller than 12 point font, and single or double spaced. Use an easily readable font face (*e.g.*, Geneva, Helvetica, Times Roman).

(b) Number each page of the application sequentially, starting with the Project Description, including the budget pages, required forms, and any appendices.

(c) Staple the application in the upper left-hand corner. Do not bind. An original and fourteen (14) copies of the application must be submitted in one package, along with two (2) additional copies of the Project Summary, Form CSREES–2003, as a separate attachment. Prior to mailing, compare the application with the checklist found at the end of this document to ensure the application is complete.

(d) Include original illustrations (photographs, color prints, etc.) in all copies of the application to prevent loss of meaning through poor quality reproduction.

(e) The contents of the application should be assembled in the following order:

(1) Proposal Cover Page (Form CSREES–2002).
(2) Table of Contents.
(3) Project Summary (Form CSREES–2003).
(4) Project Description.
(5) References to Project Description.
(6) Facilities and Equipment.
(7) Appendices to Project Description.
(8) Key Personnel.
(9) Collaborative Arrangements (including letters of support).
(10) Conflict-of-Interest List (Form CSREES–2007).
(11) Budget (Form CSREES–2004).
(12) Budget Narrative.
(13) Current and Pending Support (Form CSREES–2005).
(14) Assurance Statement(s) (Form CSREES–2008).
(15) Compliance with the National Environmental Policy Act (NEPA) (Form CSREES–2006).
(16) Certification of Compliance to section 501(c)(3) of the Internal Revenue Code of 1986.

2. Proposal Cover Page (Form CSREES–2002)

Page A

Each copy of each application must contain a Proposal Cover Page, Form CSREES–2002. One copy of the application, preferably the original, must contain the pen-and-ink signature(s) of the proposing Project Directors (PDs) and the authorized organizational representative (AOR), the individual who possesses the necessary authority to commit the organization's time and other relevant resources to the project. If there are more than three co-PDs for an application, please list additional co-PDs on a separate sheet of paper (with appropriate information and signatures) and attach to the Proposal Cover Page (Form CSREES–2002). Any proposed PD or co-PD whose signature does not appear on Form CSREES–2002 or attached additional sheets will not be listed on any resulting award. Complete both signature blocks located at the bottom of the Proposal Cover Page form. Please note that Form CSREES–2002 is comprised of two parts—Page A, which is the Proposal Cover Page, and Page B, which is the Personal Data on Project Director.

Form CSREES–2002 serves as a source document for the CSREES award database; it is therefore important that it be accurately completed in its entirety, especially the e-mail addresses requested in Blocks 4.c. and 18.c. However, the following items are highlighted as having a high potential for errors or misinterpretations:

(a) Type of Performing Organization (Block 6.a. and 6.b.). For Block 6.a., a check should be placed in the appropriate box to identify the type of organization which is the legal recipient named in Block 1. Only one box should be checked. For Block 6.b., please check as many boxes that apply to the affiliation of the PD listed in Block 16.

(b) Title of Proposed Project (Block 7.). The title of the project must be brief (140-character maximum, including spaces), yet represent the major thrust of the effort being proposed. Project titles are read by a variety of nonscientific people; therefore, highly technical words or phraseology should be avoided where possible. In addition, introductory phrases such as ''investigation of,'' ''research on,'' ''education for,'' or ''outreach that'' should not be used.

(c) Program to Which You Are Applying (Block 8.). Enter ''Native American Outreach Program''.

(d) Type of Request (Block 14.). Check the block for ''New''.

(e) Project Director (Blocks 16.–19.). Blocks 16.–18. are used to identify the PD and Block 19. to identify co-PDs. If needed, additional co-PDs may be listed on a separate sheet of paper and attached to Form CSREES–2002, the Proposal Cover Page, with the applicable co-PD information and signatures. Listing multiple co-PDs, beyond those required for genuine collaboration, is discouraged.

(f) Other Possible Sponsors (Block 21.). List the names or acronyms of all other public or private sponsors including other agencies within USDA to which your application has been or might be sent. In the event you decide to send your application to another organization or agency at a later date, you must inform the identified CSREES program contact as soon as practicable. Submitting your application to other potential sponsors will not prejudice its review by CSREES; however, submitting the same (a duplicate) application to another CSREES program is not permissible.

Page B

Page B should be submitted only with the original signature copy of the application and should be placed as the last page of the original copy of the application. This page contains personal data on the PD(s). CSREES requests this information in order to monitor the operation of its review and awards processes. This page will not be duplicated or used during the review process. Please note that failure to submit this information will in no way affect consideration of your application.

3. Table of Contents

For consistency and ease in locating information, each application must contain a detailed Table of Contents immediately following the proposal cover page. The Table of Contents should contain page numbers for each component of the application. Page numbering should begin with the first page of the Project Description.

4. Project Summary (Form CSREES–2003)

The application must contain a Project Summary, Form CSREES–2003. The summary should be approximately 250 words, contained within the box, placed immediately after the Table of Contents, and not numbered. The names and affiliated organizations of all PDs and co-PDs should be listed on this form, in addition to the title of the project. The summary should be a self-contained, specific description of the activity to be undertaken and should focus on: Overall project goal(s) and supporting objectives; plans to accomplish project goal(s); and relevance of the project to the purpose of the Native American Outreach Program. The importance of a concise, informative Project Summary cannot be overemphasized. If there are more than three co-PDs for an application, please list additional co-PDs on a separate sheet of paper (with appropriate information) and attach to the Project Summary (Form CSREES–2003).

5. Project Description

Please Note: The Project Description section may not exceed a total of eighteen (18) single- or double-spaced pages including figures and tables. This maximum has been established to ensure fair and equitable competition. The Project Description must include all of the following:

(a) Introduction—Clearly identify which of the four (4) objectives (*see* part I, B.) the proposed project seeks to address. Describe the goals, target audience and geographic area to be served. Include preliminary data/information pertinent to the proposed project.

(b) Approach—Describe the proposed activities, methods to achieve goals and expected outcomes. Justify the rationale for choosing this project approach. Specify plans for partnerships, collaborative efforts, and/or linkages to other programs and projects, where appropriate, and explain how they will contribute to the success of the project. Describe plans to involve stakeholders in identifying needs and evaluating the success of the project in meeting those needs. Include a timeline with expected completion dates for project milestones. Discuss potential pitfalls that may be encountered and limitations to the proposed approach.

(c) Evaluation and Monitoring of Project—Provide a plan for assessing and evaluating the accomplishment of stated goals during the project period. Describe ways to determine the effectiveness of the approach during and upon termination of the project. If a project is complex and requires administrative oversight, include plans for evaluating and monitoring the administration of the project, as well. This description should include how funds and resources will be allocated so that collaborative participation of all parties is ensured throughout the duration of the project.

(d) Management Plan—Explain how the project will be managed to ensure efficient administration of the grant, including the facilitation of planning, communication, and report preparation. Management of the project will be judged on the adequacy of: Overall management of the budget, including budget and collaboration with co-PDs; plans for reporting, assessing and interpreting the results; and coordination of dissemination of the information over the duration of the project.

6. References to Project Description

All references to works cited should be complete, including titles and all co-authors, and should conform to an acceptable journal format. References are not considered in the page limitation for the Project Description.

7. Facilities and Equipment

Facilities and major items of equipment that are available for use or assignment to the proposed project during the requested period of support should be described. In addition, items of nonexpendable equipment necessary to conduct and successfully conclude the proposed project should be listed (including dollar amounts), and, if funds are requested for their acquisition, justified on a separate page and attached to the budget.

8. Appendices to Project Description

Appendices to the Project Description are allowed if they are directly germane to the proposed project. The addition of appendices should not be used to circumvent page limitations.

9. Key Personnel

The following should be included, as applicable:

(a) The roles and responsibilities of each PD and/or collaborator should be clearly described; and

(b) The vitae of the PD and each co-PD, senior associate, and other professional personnel. This section should include vitae of all key persons who are expected to work on the project, whether or not CSREES funds are sought for their support. The vitae should be limited to two (2) pages each in length, excluding publications listings. The vitae should include a presentation of academic and research credentials, as applicable (*e.g.*, earned degrees, teaching experience, employment history, professional activities, honors and awards, and grants received). A chronological list of all publications in refereed journals during the past four (4) years, including those in press, must be provided for each project member for whom a curriculum vita is provided. Also list only those non-refereed technical publications that have relevance to the proposed project. All authors should be listed in the same order as they appear on each paper cited, along with the title and complete reference as these usually appear in journals.

10. Collaborative Arrangements

If it will be necessary to enter into formal consulting or collaborative arrangements with others, such arrangements should be fully explained and justified. If the consultant(s) or collaborator(s) are known at the time of application, a vitae or resume should be provided. In addition, evidence (*e.g.*, letters of support) should be provided that the collaborators involved have agreed to render these services. The applicant also will be required to provide additional information on consultants and collaborators in the budget portion of the application. See instructions in the application forms for completing Form CSREES–2004, Budget.

11. Conflict-of-Interest List (Form CSREES–2007)

A Conflict-of-Interest List, Form CSREES–2007, must be provided for all

individuals who have submitted a vitae in response to item 9.(b) of this part. Each Form CSREES–2007 must list alphabetically, by the last names, the full names of the individuals in the following categories: (a) All co-authors on publications within the past four years, including pending publications and submissions; (b) all collaborators on projects within the past four years, including current and planned collaborations; (c) all thesis or postdoctoral advisees/advisors; and (d) all persons in your field with whom you have had a consulting or financial arrangement within the past four years, who stand to gain by seeing the project funded. This form is necessary to assist program staff in excluding from application review those individuals who have conflicts of interest with the personnel in the application. The program contact must be informed of any additional conflicts of interest that arise after the application is submitted.

12. Budget

(a) Budget Form (Form CSREES–2004)

Prepare the Budget, Form CSREES–2004, in accordance with instructions provided with the application forms. A budget form is required for each year of requested support. In addition, a cumulative budget is required detailing the requested total support for the overall project period. Reasonable travel expenses for at least one member of the project team to attend two national meetings of Native Americans (to be agreed upon in consultation with CSREES) and for an appropriate number of personnel to attend a post-award meeting with CSREES may be requested as part of the project budget. The budget form may be reproduced as needed by applicants. Funds may be requested under any of the categories listed on the form, provided that the item or service for which support is requested is allowable under the authorizing legislation, the applicable statutes, regulations, and Federal cost principles, and these program guidelines, and can be justified as necessary for the successful conduct of the proposed project. Applicants also must include a budget narrative to justify their budget requests (*see* section (b) below). *See* part I, D. for indirect cost information.

(b) Budget Narrative

All budget categories, with the exception of Indirect Costs, for which support is requested, must be individually listed (with costs) in the same order as the budget and justified on a separate sheet of paper and placed immediately behind the Budget form.

13. Current and Pending Support (Form CSREES–2005)

All applications must contain Form CSREES–2005 listing other current public or private support (including in-house support) to which personnel (*i.e.*, individuals submitting a vitae in response to item 9.(b) of this part) identified in the application have committed portions of their time, whether or not salary support for person(s) involved is included in the budget. Please follow the instructions provided on this form. Concurrent submission of identical or similar applications to the possible sponsors will not prejudice application review or evaluation by the CSREES. However, an application that duplicates or overlaps substantially with an application already reviewed and funded (or to be funded) by another organization or agency will not be funded under this program. Please note that the project being proposed should be included in the pending section of the form.

14. Assurance Statement(s) (Form CSREES–2008)

A number of situations encountered in the conduct of projects require special assurances, supporting documentation, etc., before funding can be approved for the project. In addition to any other situation that may exist with regard to a particular project, applications involving any of the following elements must comply with the additional requirements as applicable.

(a) Recombinant DNA or RNA Research

As stated in 7 CFR 3015.205 (b)(3), all key personnel identified in the application and all endorsing officials of the proposing organization are required to comply with the guidelines established by the National Institutes of Health entitled, ''Guidelines for Research Involving Recombinant DNA Molecules,'' as revised. If your project proposes to use recombinant DNA or RNA techniques, you must so indicate by checking the ''yes'' box in Block 20. of Form CSREES–2002 (the Proposal Cover Page) and by completing Section A of Form CSREES–2008. For applicable applications recommended for funding, Institutional Biosafety Committee approval is required before CSREES funds will be released. Please refer to the application forms for further instructions.

(b) Animal Care

Responsibility for the humane care and treatment of live vertebrate animals used in any grant project supported with funds provided by CSREES rests with the performing organization. Where a project involves the use of living vertebrate animals for experimental purposes, all key personnel identified in an application and all endorsing officials of the proposing organization are required to comply with the applicable provisions of the Animal Welfare Act of 1966, as amended (7 U.S.C. 2131 *et seq.*), and the regulations promulgated thereunder by the Secretary in 9 CFR parts 1, 2, 3, and 4 pertaining to the care, handling, and treatment of these animals. If your project will involve these animals, you should check ''yes'' in Block 20. of Form CSREES–2002 and complete section B of Form CSREES–2008. In the event a project involving the use of live vertebrate animals results in an award, funds will be released only after the Institutional Animal Care and Use Committee has approved the project. Please refer to the application forms for further instructions.

(c) Protection of Human Subjects

Responsibility for safeguarding the rights and welfare of human subjects used in any grant project supported with funds provided by CSREES rests with the performing organization. Guidance on this issue is contained in the National Research Act, Public Law 93–348, as amended, and implementing regulations promulgated by the Department under 7 CFR part 1c. If you propose to use human subjects in your project, you should check the ''yes'' box in Block 20. of Form CSREES–2002 and complete Section C of Form CSREES–2008. In the event a project involving human subjects at risk is recommended for award, funds will be released only after the Institutional Review Board (IRB) has approved the research plan and CSREES has accepted documentation of the IRB approval. Please refer to the application forms for additional instructions.

15. Certifications

Note that by signing Form CSREES–2002 the applicant is providing the certifications required by 7 CFR part 3017, regarding Debarment and Suspension and Drug-Free Workplace, and 7 CFR part 3018, regarding Lobbying. The certification forms are included in the application package for informational purposes only. These forms should not be submitted with the application since by signing Form CSREES–2002 your organization is providing the required certifications. If the project will involve a subcontractor or consultant, the subcontractor/consultant should submit a Form AD–1048, Certification Regarding

Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions, to the grantee organization for retention in their records. This form should not be submitted to USDA.

16. Compliance With the National Environmental Policy Act (NEPA) (Form CSREES–2006)

As outlined in 7 CFR part 3407 (the CSREES regulations implementing NEPA), the environmental data for any proposed project is to be provided to CSREES so that CSREES may determine whether any further action is needed. In some cases, however, the preparation of environmental data may not be required. Certain categories of actions are excluded from the requirements of NEPA.

In order for CSREES to determine whether any further action is needed with respect to NEPA, pertinent information regarding the possible environmental impacts of a particular project is necessary; therefore, Form CSREES–2006, ''NEPA Exclusions Form,'' must be included in the application indicating whether the applicant is of the opinion that the project falls within a categorical exclusion and the reasons therefore. If it is the applicant's opinion that the proposed project falls within the categorical exclusions, the specific exclusion(s) must be identified.

Even though a project may fall within the categorical exclusions, CSREES may determine that an Environmental Assessment or an Environmental Impact Statement is necessary for an activity, if substantial controversy on environmental grounds exists or if other extraordinary conditions or circumstances are present which may cause such activity to have a significant environmental effect.

17. Certification of Compliance to Section 501(c)(3) of the Internal Revenue Code of 1986

Any community-based organization, network, or coalition of community-based organizations that is not recognized by the Internal Revenue Service as a section 501(c)(3) organization must include, on a separate sheet of paper, a statement that they have not, and will not engage in any of the prohibited activities contained in section 501(c)(3) of the Internal Revenue Code of 1986.

C. Submission of Applications

1. When To Submit (Deadline Date)

Applications must be received by COB on August 18, 2003 (5 p.m. Eastern Daylight Time). Applications received after this deadline will not be considered for funding.

2. What To Submit

An original and fourteen (14) copies of the application must be submitted. In addition, submit two (2) copies of the application's Project Summary, Form CSREES–2003. All copies of the application must be submitted in one package.

3. Where To Submit

Applicants are strongly encouraged to submit completed applications via overnight mail or delivery service to ensure timely receipt by the USDA. The address for hand-delivered applications or applications submitted using an express mail or overnight courier service is:

Native American Outreach Program, c/o Proposal Services Unit, Cooperative State Research, Education, and Extension Service, U.S. Department of Agriculture, Room 1420, Waterfront Centre, 800 9th Street, SW, Washington, DC 20024, Telephone: (202) 401–5048.

Applications sent via the U.S. Postal Service must be sent to the following address:

Native American Outreach Program, c/o Proposal Services Unit, Cooperative State Research, Education, and Extension Service, U.S. Department of Agriculture, STOP 2245, 1400 Independence Avenue, SW, Washington, DC 20250–2245.

D. Acknowledgment of Applications

The receipt of all applications will be acknowledged by e-mail. Therefore, applicants are strongly encouraged to provide accurate e-mail addresses, where designated, on the Form CSREES–2002. If the applicant's e-mail address is not indicated, CSREES will acknowledge receipt of the application by letter.

Applicants who do not receive an acknowledgment within 60 days of the submission deadline should contact the program contact. Once the application has been assigned a proposal number, that number should be cited on all future correspondence.

Part IV. Review Process

A. General

Each application will be evaluated in a two-part process. First, each application will be screened to ensure that it meets the administrative requirements as set forth in this RFA. Second, a review panel will technically evaluate applications that meet these requirements.

Reviewers will be selected based upon their training and experience in relevant scientific, programmatic, or education fields, taking into account the following factors: (a) The level of relevant formal scientific, technical education, or extension experience of the individual, as well as the extent to which an individual is engaged in relevant programmatic activities (*i.e.*, knowledge of programs related to outreach activities in field locations, especially for underserved audiences); (b) the need to include as reviewers experts from various areas of specialization within relevant scientific, education, or extension fields; (c) the need to include as reviewers others who can assess relevance of the applications to targeted audiences and to program needs; (d) the need to include as reviewers experts from a variety of Federal agencies and geographic locations; (e) the need to maintain a balanced composition of reviewers with regard to minority and female representation and an equitable age distribution; and (f) the need to include reviewers who can judge the effective usefulness to producers and the general public of each application.

B. Evaluation Criteria

Priority will be given to applications that address more than one of the objectives in part I, B. and/or serve to cover the broadest geographic representation for Native American communities. The evaluation criteria and weights, below, will be used in reviewing applications submitted in response to this RFA:

1. Degree to which proposed project addresses the objectives of the Native American Outreach Program (Weight—20);

2. Likelihood that goals of project can be achieved through the proposed activities during the project period (Weight—20);

3. Quality of plan to involve stakeholders in identifying needs and evaluating success of proposed project (Weight—15);

4. Soundness of plan for assessing and evaluating the accomplishment of project goals and plan for dissemination of results (Weight—15);

5. Qualifications of proposed project personnel and adequacy of facilities (Weight—10);

6. Adequacy of management plan (Weight—10); and

7. Quality of plan to involve partners/collaborators and link to other programs/projects (Weight—10). (Applicants proposing to address all four (4) objectives independently will not be penalized.)

C. Conflicts of Interest and Confidentiality

During the peer evaluation process, extreme care will be taken to prevent any actual or perceived conflicts of interest that may impact review or evaluation. For the purpose of determining conflicts of interest, the academic and administrative autonomy of an academic institution shall be determined by reference to the current version of the Higher Education Directory, published by Higher Education Publications, Inc., 6400 Arlington Boulevard, Suite 648, Falls Church, VA 22042. Phone: (703) 532–2300. Web site: *http://www.hepinc.com*.

Names of submitting institutions and individuals, as well as application content and peer evaluations, will be kept confidential, except to those involved in the review process, to the extent permitted by law. In addition, the identities of peer reviewers will remain confidential throughout the entire review process. Therefore, the names of the reviewers will not be released to applicants. At the end of the fiscal year, names of reviewers will be made available in such a way that the reviewers cannot be identified with the review of any particular application.

Part V. Award Administration

A. General

Within the limit of funds available for such purpose, the awarding official of CSREES shall make awards to those responsible, eligible applicants whose applications are judged most meritorious under the procedures set forth in this RFA. The date specified by the awarding official of CSREES as the effective date of the grant shall be no later than September 30 of the Federal fiscal year in which the project is approved for support and funds are appropriated for such purpose, unless otherwise permitted by law. It should be noted that the project need not be initiated on the award effective date, but as soon thereafter as practical so that project goals may be attained within the funded project period. All funds issued by CSREES under this RFA shall be expended solely for the purpose for which the funds are awarded in accordance with the approved application and budget, the regulations, the terms and conditions of the award, the applicable Federal cost principles, and the Department's assistance regulations (parts 3015, 3016 and 3019 of 7 CFR). The total period for which a grant is awarded (including all funded and no-cost time extensions) may not exceed five years.

B. Organizational Management Information

Specific management information relating to an applicant shall be submitted on a one-time basis as part of the responsibility determination prior to the award of a grant identified under this RFA, if such information has not been provided previously under this CSREES program. CSREES will provide copies of forms recommended for use in fulfilling these requirements as part of the preaward process. Although an applicant may be eligible based on its status as one of these entities, there are factors which may exclude an applicant from receiving Federal financial and nonfinancial assistance and benefits under this program (*e.g.*, debarment or suspension of an individual involved or a determination that an applicant is not responsible based on submitted organizational management information).

C. Award Document and Notice of Award

The award document will provide pertinent instructions and information including, at a minimum, the following:

1. Legal name and address of performing organization or institution to whom the Administrator has issued an award under the terms of this request for applications;
2. Title of project;
3. Name(s) and institution(s) of PDs chosen to direct and control approved activities;
4. Identifying award number assigned by the Department;
5. Project period, specifying the amount of time the Department intends to support the project without requiring recompetition for funds;
6. Total amount of Departmental financial assistance approved by the Administrator during the project period;
7. Legal authority(ies) under which the award is issued;
8. Appropriate Catalog of Federal Domestic Assistance (CFDA) number;
9. Approved budget plan for categorizing allocable project funds to accomplish the stated purpose of the award; and
10. Other information or provisions deemed necessary by CSREES to carry out the awarding activities or to accomplish the purpose of a particular award.

Part VI. Additional Information

A. Access To Review Information

Copies of reviews, not including the identity of reviewers, and a summary of the panel comments will be sent to the applicant PD after the review process has been completed.

B. Use of Funds; Changes

1. Delegation of Fiscal Responsibility

Unless the terms and conditions of the award state otherwise, the awardee may not in whole or in part delegate or transfer to another person, institution, or organization the responsibility for use or expenditure of award funds.

2. Changes in Project Plans

(a) The permissible changes by the awardee, PD(s), or other key project personnel in the approved project shall be limited to changes in methodology, techniques, or other similar aspects of the project to expedite achievement of the project's approved goals. If the awardee or the PD(s) is uncertain as to whether a change complies with this provision, the question must be referred to the Authorized Departmental Officer (ADO) for a final determination. The ADO is the signatory of the award document, not the program contact.

(b) Changes in approved goals or objectives shall be requested by the awardee and approved in writing by the ADO prior to effecting such changes. In no event shall requests for such changes be approved which are outside the scope of the original approved project.

(c) Changes in approved project leadership or the replacement or reassignment of other key project personnel shall be requested by the awardee and approved in writing by the ADO prior to effecting such changes.

(d) Transfers of actual performance of the substantive programmatic work in whole or in part and provisions for payment of funds, whether or not Federal funds are involved, shall be requested by the awardee and approved in writing by the ADO prior to effecting such transfers, unless prescribed otherwise in the terms and conditions of the award.

(e) Changes in Project Period: The project period may be extended by CSREES without additional financial support, for such additional period(s) as the ADO determines may be necessary to complete or fulfill the purposes of an approved project, but in no case shall the total project period exceed five years. Any extension of time shall be conditioned upon prior request by the awardee and approval in writing by the ADO, unless prescribed otherwise in the terms and conditions of award.

(f) Changes in Approved Budget: Changes in an approved budget must be requested by the awardee and approved in writing by the ADO prior to instituting such changes if the revision will involve transfers or expenditures of amounts requiring prior approval as set forth in the applicable Federal cost

principles, Departmental regulations, or award.

C. Expected Program Outputs and Reporting Requirements

Grantees are required to submit semi-annual and summary progress reports via CSREES' Current Research Information System (CRIS). CRIS is an electronic, Web-based inventory system that facilitates both grantee submissions of project outcomes and public access to information on Federally-funded projects.

Grantees will be expected to attend a post-award meeting with CSREES in order to facilitate project direction, and discuss relevant linkages and/or allied projects that would benefit the outreach effort through common support. Reasonable travel expenses for an appropriate number of personnel to attend this post-award meeting may be requested as part of the project budget (*see* part III, B., 12.).

Grantees also must participate in at least two national meetings of Native Americans, to be agreed upon in consultation with CSREES. Through their participation in these meetings, grantees can demonstrate to CSREES their commitment to, and skill in, providing outreach and technical assistance to Native American communities. Reasonable travel expenses for at least one member of the project team to attend these meetings may be requested as part of the project budget (see part III, B., 12.).

D. Applicable Federal Statutes and Regulations

Several Federal statutes and regulations apply to grant applications considered for review and to project grants awarded under this program. These include, but are not limited to:

7 CFR part 1, subpart A—USDA implementation of the Freedom of Information Act.

7 CFR part 3—USDA implementation of OMB Circular No. A–129 regarding debt collection.

7 CFR part 15, subpart A—USDA implementation of Title VI of the Civil Rights Act of 1964, as amended.

7 CFR part 3015—USDA Uniform Federal Assistance Regulations, implementing OMB directives (*i.e.*, OMB Circular Nos. A–21 and A–122) and incorporating provisions of 31 U.S.C. 6301–6308 (formerly the Federal Grant and Cooperative Agreement Act of 1977, Public Law 95–224), as well as general policy requirements applicable to recipients of Departmental financial assistance.

7 CFR part 3017—USDA implementation of Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants).

7 CFR part 3018—USDA implementation of Restrictions on Lobbying. Imposes prohibitions and requirements for disclosure and certification related to lobbying on recipients of Federal contracts, grants, cooperative agreements, and loans.

7 CFR part 3019—USDA implementation of OMB Circular A–110, Uniform Administrative Requirements for Grants and Other Agreements With Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations.

7 CFR part 3052—USDA implementation of OMB Circular No. A–133, Audits of States, Local Governments, and Non-profit Organizations.

7 CFR part 3407—CSREES procedures to implement the National Environmental Policy Act of 1969, as amended.

29 U.S.C. 794 (sec. 504, Rehabilitation Act of 1973) and 7 CFR part 15b (USDA implementation of statute)— prohibiting discrimination based upon physical or mental handicap in Federally assisted programs.

35 U.S.C. 200 *et seq.*—Bayh-Dole Act, controlling allocation of rights to inventions made by employees of small business firms and domestic nonprofit organizations, including universities, in Federally assisted programs (implementing regulations are contained in 37 CFR part 401).

E. Confidential Aspects of Applications and Awards

When an application results in an award, it becomes a part of the record of CSREES transactions, available to the public upon specific request. Information that the Secretary determines to be of a confidential, privileged, or proprietary nature will be held in confidence to the extent permitted by law. Therefore, any information that the applicant wishes to have considered as confidential, privileged, or proprietary should be clearly marked within the application. The original copy of an application that does not result in an award will be retained by the Agency for a period of one year. Other copies will be destroyed. Such an application will be released only with the consent of the applicant or to the extent required by law. An application may be withdrawn at any time prior to the final action thereon.

F. Regulatory Information

For the reasons set forth in the final Rule-related Notice to 7 CFR part 3015, subpart V (48 FR 29114, June 24, 1983), this program is excluded from the scope of the Executive Order 12372 which requires intergovernmental consultation with State and local officials. Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the collection of information requirements contained in this Notice have been approved under OMB Document No. 0524–0039.

G. Definitions

For the purpose of this program, the following definitions are applicable:

Administrator means the Administrator of the CSREES and any other officer or employee of the Department to whom the authority involved is delegated.

Authorized departmental officer means the Secretary or any employee of the Department who has the authority to issue or modify grant instruments on behalf of the Secretary.

Authorized organizational representative means the president, director, or chief executive officer or other designated official of the applicant organization who has the authority to commit the resources of the organization.

Department or *USDA* means the United States Department of Agriculture.

Grant means the award by the Secretary of funds to an eligible organization or individual to assist in meeting the costs of conducting, for the benefit of the public, an identified project which is intended and designed to accomplish the purpose of the program as identified in these guidelines.

Grantee means an organization designated in the award document as the responsible legal entity to which a grant is awarded.

Matching means that portion of allowable project costs not borne by the Federal Government, including the value of in-kind contributions.

Prior approval means written approval evidencing prior consent by an authorized departmental officer as defined above.

Project means the particular activity within the scope of the program supported by a grant award.

Project director means the single individual designated in the grant application and approved by the Secretary who is responsible for the direction and management of the project.

Project period means the period, as stated in the award document, during which Federal sponsorship begins and ends.

Secretary means the Secretary of Agriculture and any other officer or employee of the Department to whom the authority involved is delegated.

Done at Washington, DC, this 11th day of July 2003.

Colien Hefferan,

Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 03–18069 Filed 7–16–03; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Forest Service

Long Damon Plantation Release and Site Preparation, Modoc National Forest, Modoc County, CA

AGENCY: Forest Service, USDA.

ACTION: Cancellation notice.

SUMMARY: On March 29, 2002, a Notice of Intent (NOI) to prepare an environmental (EIS) for the Long Damon Plantation Release and Site Preparation project, on the Doublehead Ranger District of the Modoc National Forest was published in the **Federal Register**, Volume 68 (2003). I have decided to cancel the project. The NOI is hereby rescinded.

FOR FURTHER INFORMATION CONTACT: Questions may be addressed to Anne Mileck, Silviculturist, Doublehead Ranger District, 800 W. 12th Street, Alturas, CA 96101, telephone: 530–233–8803.

Dated: June 25, 2003.

Nancy Gardner,

Acting Forest Supervisor.

[FR Doc. 03–18113 Filed 7–16–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. Agenda items to be covered include: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) Brochure for Glenn/Colusa, (5) Ski-High Project/ Possible Action, (6) How to Solicit Projects, (7) November Committee Conference, (8) Status of Members, (9) General Discussion, (10) Next Agenda.

DATES: The meeting will be held on July 28, 2003, from 1:30 p.m. and end at approximately 4:30 p.m.

ADDRESSES: The meeting will be held at the Mendocino National Forest Supervisor's Office, 825 N. Humboldt Ave., Willows, CA 95988. Individuals wishing to speak or propose agenda items must send their names and proposals to Jim Giachino, DFO, 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; EMAIL *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by July 24, 2003 will have the opportunity to address the committee at those sessions.

Dated: July 10, 2003.

James Barry,

Designated Federal Official.

[FR Doc. 03–18077 Filed 7–16–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Catron County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Catron County Resource Advisory Committee will meet in Reserve, New Mexico, on August 1, 2003, at 10 a.m. MDST. The purpose of the meeting is to discuss use of product proposal form, establish process for project submission, evaluate submitted projects and select products for recommendation.

DATES: The meeting will be held August 1, 2003.

ADDRESSES: The meeting will be held at the Catron County Courtroom of the Catron Country Court House, 101 Main Street, Reserve, New Mexico, 87830. Send written comments to Michael Gardner, Catron County Resource Advisory Committee, c/o Forest Service, USDA, 3005 E. Camino del Bosque, Silver City, New Mexico, 88061–7863 or electronically to *mgardner01@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Michael Gardner, Rural Community Assistant Staff, Gila National Forest, (505) 388–8212.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members unless provided for on the agenda. However, persons who wish to bring Pub. L. 106–393 related matters to the attention of the Committee may file written statements with the Committee Staff before or after the meeting. Public input sessions will be provided and individuals may address the Committee at times provided on the agenda in the morning and afternoon.

Dated: July 11, 2003.

Marcia R. Andre,

Forest Supervisor, Gila National Forest.

[FR Doc. 03–18079 Filed 7–16–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tuolumne County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tuolumne County Resource Advisory Committee will meet on July 14, 2003 at the City of Sonora Fire Department, in Sonora, California. The purpose of the meeting is to review in detail projects submitted by members of the community, based on presentations made by project proponents, and follow-up question and answer sessions.

DATES: The meeting will be held July 14, 2003, from 12 p.m. to 3 p.m.

ADDRESSES: The meeting will be held at the Sonora Fire Department located at 201 South Shepherd Street, in Sonora, California (CA 95370).

FOR FURTHER INFORMATION CONTACT: Pat Kaunert, Committee Coordinator, USDA, Stanislaus National Forest, 19777 Greenley Road, Sonora, CA 95370 (209) 532–3671; EMAIL *pkaundert@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Presentation of nine community project submittals by the project proponents, with follow-up question and answer sessions. Time allocated for each

presentation and question/answer session is 15 minutes; and, (2) Public comment on meeting proceedings. This meeting is open to the public.

Dated: June 24, 2003.

Tom Quinn,

Forest Supervisor.

[FR Doc. 03–18114 Filed 7–16–03; 8:45 am]

BILLING CODE 3410–ED–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–834–807]

Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part; Correction

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice; correction.

SUMMARY: The Department of Commerce published a notice in the **Federal Register** on July 1, 2003, concerning the initiation of administrative reviews of various antidumping and countervailing duty orders and findings with May anniversary dates. The document contained incorrect information in the Antidumping Duty Proceedings table.

EFFECTIVE DATES: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Lisa Shishido or James C. Doyle, AD/CVD Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1382, or (202) 482–0159, respectively.

Antidumping Duty Proceedings

In the **Federal Register** of July 1, 2003, 68 FR 39055, in the table entitled ''Antidumping Duty Proceedings,'' Considar, Inc. was named under Kazakhstan: Silicomanganese, A–834–807, with a period to be reviewed of 5/1/02–4/30/03. While the review was requested by Considar, Inc., the review will be of subject merchandise produced by Transnational Co. Kazchrome and Aksu Ferroalloy Plant (''Kazchrome''). Further, the period to be reviewed will be 11/9/01–4/30/03, which begins at the date of publication of the Preliminary Determination of sales at less than fair value and the subsequent suspension of liquidation.

Dated: July 11, 2003.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 03–18134 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–820]

Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand From Thailand

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value, postponement of final determination, and negative preliminary determination of critical circumstances.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Carol Henninger or Amber Musser at (202) 482–3003 or (202) 482–1777, respectively; AD/CVD Enforcement Group II Office 5, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that prestressed concrete steel wire strand (PC strand) from Thailand is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended. The estimated margins of sales at LTFV are shown in the *Suspension of Liquidation* section of this notice. In addition, we preliminarily determine that critical circumstances do not exist with respect to PC strand produced and exported by the respondent in this investigation as well as all other producers/exporters.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

Case History

This investigation was initiated on February 20, 2003.[1] *See Notice of Initiation of Antidumping Duty Investigations: Prestressed Concrete Steel Wire Strand from Brazil, India, the Republic of Korea, Mexico, and Thailand,* 68 FR 9050 (February 27, 2003) (*Initiation Notice*). Since the initiation of the investigation, the following events have occurred:

The Department of Commerce (the Department) set aside a period for all interested parties to raise issues regarding product coverage. *See Initiation Notice*, 68 FR at 9050. No comments were received from interested parties in this investigation.

The Department issued a letter on March 7, 2003, to interested parties in all of the concurrent PC strand antidumping investigations, providing an opportunity to comment on the Department's proposed model match characteristics and its hierarchy of characteristics. The petitioners submitted comments on March 18 and 20, 2003. The Department also received comments on model matching from respondents in the concurrent investigation involving Mexico on March 18, 2003. These comments were taken into consideration by the Department in developing the model matching characteristics and hierarchy for all of the PC strand antidumping investigations.

On March 17, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of the products subject to this investigation are materially injuring an industry in the United States producing the domestic like product. See Prestressed Concrete Steel Wire Strand From Brazil, India, Korea, Mexico, and Thailand, 68 FR 13952 (March 21, 2003).

On April 4, 2003 the Department issued its antidumping questionnaire to Siam Industrial Wire Co., Ltd. (SIW).[2] We received responses to sections A–D of the antidumping questionnaire and

[1] The petitioners in this investigation are American Spring Wire Corp., Insteel Wire Products Company, and Sumiden Wire Products Corp.

[2] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

issued supplementary questionnaires where appropriate. On June 17, 2003, the petitioners alleged that critical circumstances exist with respect to imports of PC strand from Thailand. Accordingly, pursuant to section 732(e) of the Act, on June 18, 2003, the Department requested information from SIW regarding monthly shipments of PC strand to the United States during the period January 2000 to July 2003. We subsequently shortened this reporting period by one year. The respondent submitted the requested information on June 25, 2003. The critical circumstances analysis for the preliminary determination is discussed below under *Critical Circumstances.*

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise. In accordance with 19 CFR 351.210(e)(2) the Department requires that exporters requesting postponement of the final determination must also request an extension of the provisional measures referred to in section 733(d) of the Act from a four-month period until not more than six months. We received a request to postpone the final determination from respondent, SIW. In its request, SIW consented to the extension of provisional measures to no longer than six months. Since this preliminary determination is affirmative, the request for postponement is made by an exporter that accounts for a significant proportion of exports of the subject merchandise, and there is no compelling reason to deny the respondent's request, we have extended the deadline for issuance of the final determination until the 135th day after the date of publication of this preliminary determination in the **Federal Register** and have extended provisional measures to no longer than six months.

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producer/exporters of subject merchandise, section 777A(c)(2) of the Act permits the Department to investigate either: (1) A sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined. In the petition, the petitioners identified six producers of PC strand in Thailand. The data on the record indicates that SIW is the only producer of the subject merchandise in Thailand that exports to the United States. See Memorandum from Daniel O'Brien, International Trade Compliance Analyst, to Gary Taverman, Director, Office 5, Re: Selection of Respondents, dated April 4, 2003.

Period of Investigation

The period of investigation (POI) is January 1, 2002, through December 31, 2002. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.,* January 2003) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

For purposes of this investigation, PC strand is steel strand produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.

The merchandise under investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Product Comparisons

In accordance with section 771(16) of the Act, all products produced by the respondent covered by the description in the *Scope of Investigation* section, above, and sold in Thailand during the POI, are considered to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We have relied on four criteria to match U.S. sales of subject merchandise to comparison-market sales of the foreign like product: diameter, covering/coating, grade, and type. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above.

Fair Value Comparisons

To determine whether sales of PC strand from Thailand were made in the United States at LTFV, we compared the constructed export price (CEP) to the normal value (NV), as described in the *Constructed Export Price* and *Normal Value* sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average CEPs. We compared these to weighted-average home market prices in Thailand. *See Constructed Export Price,* section below.

For the price to the United States, we used CEP, as defined in section 772(b) of the Act. Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections 772(c) and (d) of the Act.

Constructed Export Price

For SIW, we calculated CEP based on the packed prices charged to the first unaffiliated customer in the United States. We calculated a CEP for SIW's sales, all of which were made by an affiliated reseller in the United States prior to the date of importation by or for the account of the producer.

In accordance with section 772(c)(2) of the Act, we made deductions from the starting price for movement expenses. These include inland freight, international freight, foreign brokerage and handling, U.S. warehousing expenses, U.S. duties, and U.S. freight forwarding expenses. We also added duty drawback, in accordance with section 772(c)(1)(B) of the Act.

Section 772(d)(1) of the Act provides for additional adjustments to calculate CEP. Accordingly, we deducted from the starting price those selling expenses that were incurred in selling the subject merchandise in the United States, including commission and other direct selling expenses (credit and warranty expenses) and indirect selling expenses related to commercial activity in the United States and added an amount for interest revenue. We also deducted from CEP an amount for profit, in accordance with section 772(d)(3) of the Act.

Normal Value

A. Selection of Comparison Markets

Section 773(a)(1) of the Act directs that NV be based on the price at which

the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate), that the time of the sales reasonably corresponds to the time of the sale used to determine export price (EP) or CEP, and that there is no particular market situation that prevents a proper comparison with the EP or CEP. The statute contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

We found that SIW had a viable home market for PC strand. As such, the respondent submitted home market sales data for purposes of the calculation of NV.

In deriving NV, we made adjustments as detailed in the *Calculation of Normal Value Based on Home Market Prices* and *Calculation of Normal Value Based on Constructed Value* sections below.

B. Cost of Production Analysis

Based on allegations contained in the petition, and in accordance with section 773(b)(2)(A)(i) of the Act, we found reasonable grounds to believe or suspect that PC strand sales were made in Thailand at prices below the cost of production (COP). *See Initiation Notice,* 68 FR at 9050. As a result, the Department has conducted an investigation to determine whether SIW made home market sales at prices below their respective COPs during the POI within the meaning of section 773(b) of the Act. We conducted the COP analysis described below.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated a weighted-average COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for the home market general and administrative (G&A) expenses, including interest expenses and packing expenses.

We relied on the COP information submitted by SIW in its cost questionnaire responses, except for the following adjustments:

a. We disallowed SIW's claimed labor and overhead adjustment factors.

b. We adjusted SIW's financial expense and G&A ratios in accordance with the Department's change in the treatment of foreign exchange gains and losses.

c. We adjusted SIW's G&A ratio to exclude gain on forward hedging and gain on stock valuation.

See Memorandum from James Balog, Accountant, to Neal Halper, Director, Office of Accounting, Re: Cost of Production Calculation Adjustments for the Preliminary Determination, dated July 10, 2003.

SIW departed from its normal accounting records in allocating labor and overhead costs to specific dimensions of PC strand products produced. In departing from its normal books and records, SIW claimed that it relied on engineering information to determine adjustment ratios. In our supplemental questionnaire issued on June 13, 2003, we requested that SIW provide supporting information for the engineering factors used. However, SIW failed to provide adequate support and explanation for the derivation of these adjustment factors. As such, for the preliminary determination, we did not rely on the production engineering information used by SIW to adjust the standard labor and overhead costs maintained in its normal books and records and instead, relied on facts otherwise available. Sections 776(a)(2)(A) and (D) of the Act provide that if an interested party withholds information that has been requested, or provides information which cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Pursuant to sections 782(d) and (e) of the Act the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

When asked to submit additional information to support its adjustments, SIW failed to adequately do so in its June 27, 2003, supplemental section D response. We believe the information provided to support SIW's adjustments was incomplete and cannot serve as a reliable basis for reaching a determination. As facts otherwise available, we relied on the labor and overhead cost allocations as maintained in its normal books and records, unadjusted. On July 10, 2003, we issued a second supplemental D questionnaire giving SIW another opportunity to provide the requested information. The due date for submission of this information is July 17, 2003.

2. Test of Home Market Sales Prices

We compared the adjusted weighted-average COP for SIW to its home-market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP within an extended period of time (*i.e.,* a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time.

On a model-specific basis, we compared the revised COP to the home market prices, less any applicable movement charges, discounts, rebates, billing adjustments, and direct and indirect selling expenses (which were also deducted from COP).

3. Results of the COP Test

Pursuant to section 773(b) of the Act, which provides that sales made below COP may be disregarded only if, among other things, they are made in ''substantial quantities'' (*i.e.,* 20 percent or more of a respondent's sales of a given product), we did not disregard any below-cost sales because we determined that the below-cost sales were not made in ''substantial quantities.'' As this was the case for all products sold in the home market, we did not disregard any sales as below-cost.

C. Calculation of Normal Value Based on Home Market Prices

We determined NV for the respondent company as follows. We made adjustments for any differences in packing and deducted home market movement expenses pursuant to sections 773(a)(6)(A) and 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act by deducting billing adjustments, discounts, rebates, and direct selling expenses incurred for home market sales (credit expenses).

D. Arm's-Length Sales

SIW reported sales of the foreign like product to an affiliated end-user customer and an affiliated reseller. To test whether these sales to affiliated customers were made at arm's length, where possible, we compared the prices of sales to affiliated and unaffiliated customers, net of all movement charges, direct selling expenses, and packing. Where the price to the affiliated party was, on average, between 98 and 102 percent of the price to unaffiliated parties, we determined that sales made to the affiliated party were at arm's length. *See Antidumping Proceedings:*

Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186, (November 15, 2002). SIW's sales to its affiliated end-user customer did not fall within that range and were excluded from our analysis. SIW's sales to its affiliated reseller fell within that range, and so for the purposes of the preliminary determination, we have included SIW's sales to its affiliated reseller in the determination of NV. However, we are continuing to review SIW's reporting of its home market sales to its affiliated reseller. On July 10, 2003, we issued a second supplemental questionnaire requesting additional information regarding these sales. The due date for submission of this information is July 17, 2003.

E. Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the EP or CEP transaction. The NV level of trade is that of the starting-price sales in the comparison market. For CEP transactions, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different level of trade than the CEP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act.

In implementing these principles in this investigation, we obtained information from SIW about the marketing stages involved for the reported U.S. and home market sales, including a description of the selling activities performed by the respondents for each channel of distribution. In identifying levels of trade for home market sales we considered the selling functions reflected in the starting price before any adjustments. For CEP sales, we considered only the selling activities reflected in the price after the deduction of expenses pursuant to section 772(d) of the Act.

In conducting our level-of-trade analysis for the respondent, we examined the specific types of customers, the channels of distribution, and the selling practices of the respondent. Generally, if the reported levels of trade are the same, the functions and activities of the seller should be similar. Conversely, if a party reports levels of trade that are different for different categories of sales, the functions and activities may be dissimilar. The following is a discussion of our findings.

SIW has two channels of distribution in the home market: (1) Direct sales to end customers, and (2) sales to an affiliated reseller. SIW's selling functions, such as engineering services, advertising, packing, and technical assistance, are identical for both channels of distribution in the home market. Therefore, sales through both of these channels are made at the same level of trade (LOT 0). In the U.S. market, SIW has two channels of distribution: (1) Direct sales, and (2) inventory sales. SIW's selling functions, such as advertising, packing, and freight and delivery, are identical for these two channels of distribution. Therefore, all of SIW's U.S. sales are CEP sales made at the same level of trade (LOT 1).

With regard to the U.S. sales, we considered only the selling activities reflected in the price after the deduction of expenses and profit covered in section 772(d) of the Act. After we deducted the expenses and profit covered in section 772(d), we determined that SIW performs more selling functions for sales made in the home market, than for sales made to its U.S. affiliate, Cementhai SCT USA. In the home market SIW provides additional selling functions, such as engineering services and technical assistance, processing rebates and cash discounts, performing sales forecasting, strategic planning and marketing research, and employing direct sales and marketing personnel.

There is only one level of trade in the home market and we have no other appropriate information on which to determine if there is a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the level of trade of the export transactions. As a result, we are granting a CEP offset pursuant to section 773(a)(7)(B) of the Act.

Currency Conversions

We made currency conversions into U.S. dollars in accordance with section 773A of the Act based on exchange rates in effect on the dates of the U.S. sale, as obtained from the Federal Reserve Bank (the Department's preferred source for exchange rates).

Critical Circumstances

On June 17, 2003, petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigations of PC strand from Thailand. In accordance with 19 CFR 351.206(c)(2)(i), because petitioners submitted critical circumstances allegations more than 20 days before the scheduled date of the preliminary determination, the Department must issue preliminary critical circumstances determinations not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that: (A)(i) There is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

According to 19 CFR 351.206(h)(1), in determining whether imports of the subject merchandise have been ''massive,'' the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that ''unless the imports during a ''relatively short period'' have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.''

In accordance with 19 CFR 351.206(i) the Department defines ''relatively short period'' as generally the period beginning on the date the proceeding begins (*i.e.,* the date the petition is filed) and ending at least three months later. This section further provides that, if the Department finds that importers, exporters or producers had reason to believe at some time prior to the filing of the petition that a proceeding was likely, then the Department may consider a period of not less than three months from that earlier time.

In determining whether the above statutory criteria have been satisfied, we examined: (1) The evidence presented in the petitioners' submission of June 17, 2003; (2) exporter-specific shipment

data requested by the Department; (3) import data available through the ITC's DataWeb Web site; and (4) the ITC preliminary injury determination.

To determine whether a history of dumping and material injury exists, the Department generally considers current or previous antidumping duty orders on the subject merchandise from the country in question in the United States and current orders in any other country. The Department will normally not consider the initiation of a case, nor a preliminary or final determination of sales at LTFV in the absence of an affirmative finding of material injury by the ITC, as indicative of a history sufficient to satisfy this criterion. *See Preliminary Determination of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova,* 65 FR 70696 (November 27, 2000). With regard to imports of PC strand from Thailand, the petitioners make no specific mention of a history of dumping. We are not aware of any antidumping order in the United States or elsewhere on PC strand from Thailand. For this reason, the Department does not find a history of injurious dumping of the subject merchandise from Thailand pursuant to section 733(e)(1)(A)(i) of the Act.

In determining whether there is a reasonable basis to believe or suspect that an importer knew or should have known that the exporter was selling PC strand at LTFV, the Department must rely on the facts before it at the time the determination is made. The Department normally considers margins of 25 percent or more for EP sales and 15 percent or more for CEP sales sufficient to impute knowledge of dumping. *See e.g., Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China,* 62 FR 31972, 31978 (June 11, 1997). The Department generally bases its decision, with respect to knowledge, on the margins calculated in the preliminary determination. Because the preliminary dumping margin for the respondent is less than 15 percent, we find there is no reasonable basis to impute knowledge of dumping with respect to these imports from Thailand.

It is also the Department's practice to conduct its critical circumstances analysis of companies in the ''all others'' category based on the experience of the investigated company. Because we are determining that critical circumstances do not exist for SIW in this investigation, we are concluding that critical circumstances do not exist for companies covered by the ''all others'' rate.

Accordingly, we find that critical circumstances do not exist for imports of PC strand from Thailand. We will make a final determination concerning critical circumstances for all producers and exporters of subject merchandise from Thailand when we make our final determination in this investigation, which will be 135 days after the date of publication of the preliminary determination.

Verification

In accordance with section 782(i) of the Act, we intend to verify all information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing the BCBP to suspend liquidation of all entries of PC strand from Thailand, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We are also instructing the BCBP to require a cash deposit or the posting of a bond equal to the weighted-average dumping margin as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Producer/exporter	Weighted-average margin (percentage)
Siam Industrial Wire Co., Ltd ...	11.52
All Others	11.52

Disclosure

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties in this proceeding in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the final determination in this proceeding is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of PC strand from Thailand are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs on the later of 50 days after the date of publication of this notice or one week after the issuance of the verification reports. *See* 19 CFR 351.309(c)(1)(i). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days after the deadline for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we will tentatively hold the hearing two days after the deadline for submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs. See 19 CFR 351.310(c). The Department will make its final determination no later than 135 days after the date of publication of this preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: July 10, 2003.

Jeffrey May,

Acting Assistant Secretary for Grant Aldonas, Under Secretary.

[FR Doc. 03–18129 Filed 7–16–03; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–831]

Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Prestressed Concrete Steel Wire Strand From Mexico

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value, postponement of final determination, and affirmative preliminary determination of critical circumstances in part.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: James Kemp or Daniel O'Brien at (202) 482–5346 or (202) 482–1376, respectively; AD/CVD Enforcement Group II Office 5, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that prestressed concrete steel wire strand (PC strand) from Mexico is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The preliminary margin assigned to Cablesa, S.A. de C.V (Cablesa) is based on adverse facts available (AFA). The estimated margins of sales at LTFV are shown in the *Suspension of Liquidation* section of this notice. In addition, we preliminarily determine that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to PC strand produced and exported by Cablesa.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

Case History

This investigation was initiated on February 20, 2003.[1] *See Notice of Initiation of Antidumping Duty Investigations: Prestressed Concrete Steel Wire Strand from Brazil, India, the Republic of Korea, Mexico, and Thailand,* 68 FR 9050 (February 27, 2003) (*Initiation Notice*). Since the initiation of the investigation, the following events have occurred:

The Department of Commerce (the Department) set aside a period for all interested parties to raise issues regarding product coverage. *See Initiation Notice,* 68 FR at 9050. Aceros Camesa S.A. de C.V. (Camesa) and Cablesa submitted comments on product coverage on March 19, 2003. The petitioners rebutted these comments on March 28, 2003. *See Class or Kind* below.

The Department issued a letter on March 7, 2003, to interested parties in all of the concurrent PC strand antidumping investigations, providing an opportunity to comment on the Department's proposed model match characteristics and its hierarchy of characteristics. The petitioners submitted comments on March 18 and 20, 2003. The Department also received comments on model matching from Camesa and Cablesa on March 18, 2003. These comments were taken into consideration by the Department in developing the model matching characteristics and hierarchy for all of the PC strand antidumping investigations.

On March 17, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of the products subject to this investigation are materially injuring an industry in the United States producing the domestic like product. *See Prestressed Concrete Steel Wire Strand From Brazil, India, Korea, Mexico, and Thailand,* 68 FR 13952 (March 21, 2003) (*ITC Preliminary Determination*).

On April 4, 2003, the Department issued its antidumping questionnaire to Camesa and Cablesa, specifying that the responses to Section A and Sections B–D would be due on April 25, and May 12, 2003, respectively.[2] We received responses to Sections A–D of the antidumping questionnaire and issued supplementary questionnaires where appropriate.[3]

On June 17, 2003, the petitioners alleged that critical circumstances exist with respect to imports of PC strand from Mexico. Accordingly, pursuant to section 732(e) of the Act, on June 18, 2003, the Department requested information from Camesa and Cablesa regarding monthly shipments of PC strand to the United States during the period January 2000 to July 2003. We subsequently shortened this reporting period by one year. The respondents submitted the requested information on June 25, 2003. The critical circumstances analysis for the preliminary determination is discussed below under *Critical Circumstances.*

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise. In accordance with 19 CFR 351.210(e)(2), the Department requires that exporters requesting postponement of the final determination must also request an extension of the provisional measures referred to in section 733(d) of the Act from a four-month period until not more than six months. We received a request to postpone the final determination from both Camesa and Cablesa. In their requests, Camesa and Cablesa consented to the extension of provisional measures to no longer than six months. Since this preliminary determination is affirmative, the requests for postponement are made by exporters that account for a significant proportion of exports of the subject merchandise, and there is no compelling reason to deny the respondents' requests, we have extended the deadline for issuance of the final determination until the 135th day after the date of publication of this preliminary determination in the **Federal Register** and have extended provisional measures to no longer than six months.

[1] The petitioners in this investigation are American Spring Wire Corp., Insteel Wire Products Company, and Sumiden Wire Products Corp.

[2] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

[3] *See,* also, *Facts Available* section of this notice.

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producer/exporters of subject merchandise, section 777A(c)(2) of the Act permits the Department to investigate either: (1) A sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined. In the petition, the petitioners identified seven producers of PC strand in Mexico. On April 3, 2003, counsel for Camesa and Cablesa indicated that, to the best of their knowledge, those two firms were the only Mexican producers of PC strand that exported to the United States during the period of investigation (POI).[4] The U.S. embassy in Mexico City provided information that corroborates this claim. Additionally, in an April 2, 2003, submission, Camesa and Cablesa provided the Department with their U.S. export quantities of subject merchandise during the POI. Based on the imported quantities reported by the U.S. Bureau of Customs and Border Protection (BCBP), we are satisfied that the record supports the conclusion that Camesa and Cablesa are the only Mexican producers that exported the subject merchandise to the United States. *See* Memorandum from Daniel O'Brien, International Trade Compliance Analyst, to Gary Taverman, Director, Office 5, Re: Selection of Respondents, dated April 4, 2003.

Period of Investigation

The POI is January 1, 2002, through December 31, 2002. This period corresponds to the four most recent fiscal quarters prior to the month of filing of the petition (*i.e.,* January, 2003) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

For purposes of this investigation, PC strand is steel strand produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.

The merchandise under investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Class or Kind

On March 19, 2003, the respondents in this investigation requested that the Department exclude covered PC strand [5] from the scope of this investigation. In the same letter, the respondents requested that in the event that the Department does not exclude covered PC strand from the scope, the Department determine that there are two separate classes or kinds of merchandise subject to investigation: (1) Uncovered PC strand used for pre-tensioning applications and (2) covered PC strand used for post-tensioning applications. The petitioners submitted a rebuttal to the respondents requests on March 28, 2003. We have preliminarily determined that the scope of this investigation properly includes covered PC strand. Additionally, we have preliminarily determined that covered and uncovered PC strand constitute one class or kind of merchandise.

Although the Department has the authority to define the scope of an investigation, that authority cannot be used to deprive the petitioner of relief with respect to products the petitioner clearly and explicitly intended to be included in the investigation, unless the resulting order would thereby become unadministrable. Therefore, without the petitioner's consent, the Department has rarely used its authority to narrow the scope of an investigation. *See* Memorandum from Jim Kemp and Salim Bhabhrawala, Import Compliance Specialists, to Holly Kuga, Acting Deputy Assistant Secretary for Group II, Re: Consideration of Scope Exclusion Request and Class or Kind Determination, dated July 10, 2003 (Scope Exclusion Request and Class or Kind Determination).

The Mexican respondents argue that covered PC strand should be excluded because the petitioners do not manufacture the product. However, the statute does not require that the petitioners have to produce every type of product that is encompassed by the scope of the investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan,* 65 FR 42985 (July 12, 2000).

The Department has the authority to narrow the scope of an investigation, but rarely does so except in cases where the petitioner makes such a request or the scope as worded creates ambiguities and administrability problems. In this case, the petitioners' requested scope specifically states that covered PC strand should be included in the investigation. Given the clarity of the petitioners' request to include covered PC strand within the scope and the apparent absence of any difficulties in its inclusion, we find no reason to exclude covered PC strand from the scope of this investigation.

We have also preliminarily determined that there is only one class or kind of merchandise for PC strand. Our determination is based on an evaluation of the criteria set forth in *Diversified Products* v. *United States,* 572 F. Supp. 883, 889 (CIT 1983) (*Diversified Products*), which look to differences in: (1) The general physical characteristics of the merchandise; (2) the expectations of the ultimate purchaser; (3) the ultimate use of the merchandise; (4) the channels of trade in which the merchandise moves, and; (5) the manner in which the product is advertised or displayed.

In our analysis of the *Diversified Products* criteria, we find that the physical similarities of covered and uncovered PC strand are much greater than the slight change created by the application of grease and plastic coating. The defining characteristic of these products continues to be the strand and covering the merchandise does not change the strand or its chemical or physical properties. Additionally, the expectations of the user and the use of the products is generally the same. It appears to be common practice in the industry for end-users to purchase uncovered PC strand and add covering for post-tension applications, creating the same end-use expectations for both products. Furthermore, the use of the product is essentially the same for post and pre-tensioning applications. Covered and uncovered PC strand is a product used in construction designed to ''introduce specified compressive forces into concrete to offset, or neutralize, forces that occur when the prestressed concrete is subject to load.'' *ITC Preliminary Determination,* 68 FR at 19652; *see also* Investigations Nos. 701–TA–432 and 731–TA–1024–1028 (Preliminary), USITC Pub. 3589, (March 2003) at 9. Therefore, whether the

[4] *See* Memorandum from Daniel O'Brien, International Trade Compliance Analyst, to the File, Re: Telephone Call with Counsel for Mexican Producers Aceros Camesa and Cablesa Regarding Investigation of Prestressed Concrete Steel Wire Strand from Mexico, dated April 3, 2003.

[5] Covered PC strand is usually coated with grease and encased in plastic covering.

product is covered or not does not change the ultimate use; only the process employed to apply the PC strand differs between the two products. With regard to channels of trade, we have concluded that end-use customers purchase both types of PC strand and there is no clear division in channels of trade between uncovered and covered PC strand. Finally, we note that no information was placed on the record regarding the advertising or display of uncovered or covered PC strand.

Therefore, we find that uncovered and covered PC strand constitute the same class or kind of merchandise. For a further discussion on this topic, *see* Scope Exclusion Request and Class or Kind Determination.

Facts Available

For the reasons discussed below, we determine that the use of AFA is appropriate for the preliminary determination with respect to Cablesa.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to section 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In accordance with section 776 of the Act, for the reasons explained below, we preliminarily determine that the use of total AFA is warranted with respect to Cablesa. The Department received Cablesa's incomplete response to section D of the antidumping duty questionnaire on May 28, 2003. In that response, Cablesa failed to respond to section III (Response Methodology) of the questionnaire. Instead, Cablesa stated that it was working diligently to complete its response to that section and that it would submit its response as soon as possible.

Section III of the section D questionnaire instructs the respondent to fully explain its cost response methodology, provide reconciliations of the cost of sales from its financial statements to the reported costs, provide detailed cost build-ups for two models sold in the home and U.S. markets, provide a worksheet showing the computation of the general and administrative (G&A) expenses rate, and provide a worksheet showing the computation of the net financial expense rate. After receiving a telephone call from Department officials, on June 5, 2003, Cablesa responded to the missing items in part. *See* Memorandum from Salim Bhabhrawala, International Trade Compliance Analyst, to the File, Re: Missing Portions of Cablesa's Section D Response, dated June 9, 2003. On June 11, 2003, the Department issued Cablesa a supplemental section D questionnaire requesting that it provide additional information or clarification on several issues, as well as the missing items from the prior cost response. The response to this supplemental questionnaire was due on June 25, 2003. On June 13, 2003 Cablesa requested an extension until July 2, 2003. The Department granted an extension until June 30, 2003. Cablesa again submitted a wholly inadequate response to the supplemental section D questionnaire. The deficiencies are detailed below.

Throughout the course of this investigation, Cablesa has repeatedly failed to submit information and data on the record of this proceeding in the proper manner as established in the Department's regulations. The Department, on numerous occasions, provided Cablesa detailed information on how to properly submit the information and data, granted Cablesa extensions to reply to requests for information, and provided Cablesa an opportunity to explain and correct the deficiencies in its responses. However, at no point in the investigation did Cablesa notify the Department that it had any difficulties in submitting the information. Instead, Cablesa stated that it was working diligently to complete its responses.

Because of the deficiencies in Cablesa's initial, subsequent and supplemental section D responses, the Department finds that the cost information on the record is so incomplete that it cannot serve as a reliable basis for reaching a determination. Specifically, Cablesa failed to provide: (1) A reconciliation of the cost of sales in their financial statements to the reported costs; (2) detailed cost build-ups for the requested models sold in the home and U.S. markets; (3) worksheets showing the weight-averaging of the costs for the models produced at more than one production facility; (4) an explanation of its cost accounting system and how costs were allocated between subject and non-subject merchandise; (5) an explanation of its cost response methodology; (6) an explanation as to whether the reported costs were based on world-wide production quantities and not on any specific market; (7) a reconciliation of the production quantities to the sales quantities; (8) audited consolidated financial statements together with independent auditors report and footnotes; (9) audited unconsolidated financial statements together with independent auditors report and footnotes; (10) the summary trial balance from which the unconsolidated financial statements were prepared; (11) treatment of depreciation expense related to idle assets; (12) an explanation of capitalizing the G&A expenses in their normal books and records; and (13) the requested G&A expenses rate calculation.

Cablesa failed to provide adequate responses to the Department's requests for cost information. Despite the Department's attempts to obtain the missing information, pursuant to section 782(d) of the Act, Cablesa failed to rectify its deficiencies. Because the information that Cablesa failed to report is critical for purposes of the preliminary dumping calculations, the Department must resort to facts otherwise available in reaching its preliminary determination, pursuant to sections 776(a)(2)(A), (C), and (D) of the Act.

On July 10, 2003, the Department issued its final supplemental questionnaire to Cablesa addressing the deficiencies, as detailed above, in the company's cost response. Cablesa's response to our request for information is due on July 17, 2003.

Furthermore, our review of Cablesa's U.S. sales response has led us to conclude that the reported sales may be inappropriate as the basis for CEP. The Department's original questionnaire specifically instructed Cablesa to identify any parties with which it is affiliated, including affiliations based on control. The questionnaire defines situations which may indicate control to

include close relationship with a supplier, (sub) contractor, lender, distributor, exporter or reseller. Evidence currently on the record suggests that Cablesa may be affiliated with its sole U.S. customer, thereby necessitating that Cablesa provide the downstream sales of that customer. We intend to pursue this issue further.

B. Application of Adverse Inferences for Facts Available

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 870 (1994) (SAA). Furthermore, ''{a}ffirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Countervailing Duties: Final Rule,* 62 FR 27296, 27340 (May 19, 1997).

We find that the application of an adverse inference in this case is appropriate. Cablesa failed to provide critical data regarding its costs. Despite the Department's instructions in the original and supplemental questionnaires, and the extensions granted, Cablesa made no effort to provide any explanation or propose an alternate form of submitting the data. Cablesa's actions have rendered the cost response useless for purposes of the dumping analysis. This constitutes a failure on the part of this company to cooperate ''to the best of its ability to comply with a request for information'' by the Department within the meaning of section 776 of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted because Cablesa has failed to respond adequately to the Department's request. *See Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey,* 65 FR 15123 (March 21, 2000).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. *See also* 19 CFR 351.308(c); SAA at 829–831. In this case, because we are unable to calculate a margin for Cablesa, we assign to Cablesa the highest margin alleged for Mexico in the petition. *See Initiation Notice,* 68 FR at 9053.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition) in using facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* 19 CFR 351.308(d); *see also* SAA at 870.

To assess the reliability of the petition margin for the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition for both this preliminary determination and during our pre-initiation analysis. *See* Office of AD/CVD Enforcement Initiation Checklist, at 15 (February 20, 2003) (*Initiation Checklist*). Also, as discussed below, we examined evidence supporting the calculations in the petition to determine the probative value of the margins in the petition for use as AFA for purposes of this preliminary determination. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the export price (EP) and normal value (NV) calculations on which the margins in the petition were based. *See* Memorandum from Daniel O'Brien, International Trade Compliance Analyst, to the File, Re: Corroboration of Data Contained in the Petition for Assigning Facts Available Rate (Corroboration Memo), dated July 10, 2003.

1. Corroboration of Export Price

The petitioners based EP on prices within the POI for sales of PC strand manufactured by a Mexican producer and offered for sale directly to an unaffiliated U.S. customer. The petitioners averaged the gross prices for the individual prices and deducted U.S. import duties, freight and insurance to the U.S. port of entry, and U.S. inland freight from the average price. The petitioners did not deduct U.S. harbor maintenance and merchandise processing fees, based on the conservative assumption that the Mexican products were shipped over land.

In the petition, the Department was provided with two affidavits for U.S. pricing data for Camesa, one for pricing of ½ inch, 270 grade PC strand delivered to the U.S. port of entry, and the other for pricing of ½ inch, 270 grade PC strand delivered to the U.S. customer. For purposes of corroborating these price-to-price calculations in the petition, we compared this price to Cablesa's U.S. sales database submitted on June 18, 2003. Using this data, we noted that the prices listed in the affidavits in the petition were comparable to the data submitted by Camesa; therefore, we find that the petitioners' information for U.S. price continues to have probative value. *See* Corroboration Memo.

2. Corroboration of Normal Value

With respect to NV, the petitioners provided a home market price that was obtained from an invoice for a sale by Camesa in Mexico to an unaffiliated customer. The petitioners state that the invoice price reported was a delivered price. To calculate the NV, the petitioners deducted inland freight from the home market price, and, consistent with our statutory EP circumstances-of-sale calculation methodology, adjusted the home market price for imputed credit and commissions by deducting home market credit expenses from the home market prices and adding the U.S. imputed credit and U.S. commission expenses to this price.

We confirmed that the invoice submitted by the petitioners was correctly included in Camesa's home market database submitted to the Department on June 18, 2003, and note therefore that it has probative value. *See* Corroboration Memo at 2.

The implementing regulation for section 776 of the Act, at 19 CFR 351.308(d) states, ''{t}he fact that corroboration may not be practicable in

a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.'' Additionally, we note that the SAA at 870 specifically states that, where ''corroboration may not be practicable in a given circumstance,'' the Department need not ''prove that the facts available are the best alternative.'' There are no independent sources for the cost data used to calculate the CV in the petition. Where relevant information was available from Cablesa's financial statements, that information was used in the calculation of CV.

Therefore, based on our efforts, described above, to corroborate information contained in the petition, and in accordance with 776(c) of the Act, we consider the margins in the petition to be corroborated to the extent practicable for purposes of this preliminary determination.

Accordingly, in selecting AFA with respect to Cablesa, we have applied the margin rate of 77.20 percent, which is the highest estimated dumping margin set forth in the notice of initiation. *See Initiation Notice*, 68 FR at 9053.

Product Comparisons

In accordance with section 771(16) of the Act, all products produced by the respondents covered by the description in the *Scope of Investigation* section, above, and sold in Mexico during the POI, are considered to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We have relied on four criteria to match U.S. sales of subject merchandise to comparison-market sales of the foreign like product: diameter, covering/coating, grade, and type. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above.

Fair Value Comparisons

To determine whether sales of PC strand from Mexico were made in the United States at LTFV, we compared the EP and the constructed export price (CEP) to the NV, as described in the *Export Price and Constructed Export Price* and *Normal Value* sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and CEPs. We compared these to weighted-average home market prices in Mexico. For Camesa, we compared all U.S. and home market sales made during the POI, based on the date of issuance of Camesa's purchase orders. We determined this to be the appropriate date of sale because the quantity and price of the sales did not change after the date of the purchase order.

Export Price and Constructed Export Price

For the price to the United States, we used, as appropriate, EP or CEP, as defined in sections 772(a) and 772(b) of the Act, respectively. Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold before the date of importation by the producer or exporter outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection 722(c) of the Act.

Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections 772(c) and (d) of the Act.

For Camesa, we calculated EP and CEP, as appropriate, based on the packed prices charged to the first unaffiliated customer in the United States. We found that Camesa made EP sales during the POI. These sales are properly classified as EP sales because they were made outside the United States by the exporter or producer to unaffiliated customers in the United States prior to the date of importation. We note that Camesa's affiliated reseller in the United States provided certain administrative services pertaining to the reported EP sales. However, our analysis of sales documents in the questionnaire response, indicated that these services were minor and that the invoicing was done by Camesa and payment was made to Camesa. Therefore, since CEP was not otherwise warranted based on the facts on the record, we have preliminarily concluded that the sales were, in fact, EP. We will continue to analyze these sales and this issue for the final determination.

We also found that Camesa made CEP sales during the POI. These sales are properly classified as CEP sales because they were made for the account of Camesa, by a seller affiliated with Camesa, to an unaffiliated purchaser in the United States.

In accordance with section 772(c)(2) of the Act, for both EP and CEP sales we made deductions from the starting price for movement expenses and export taxes and duties, where appropriate. These included inland freight, insurance expenses, brokerage and handling fees, and customs duties. Section 772(d)(1) of the Act provides for additional adjustments to calculate CEP. Accordingly, where appropriate, we deducted direct and indirect selling expenses related to commercial activity in the United States. Pursuant to section 772(d)(3) of the Act, where applicable, we made an adjustment for CEP profit.

Regarding CEP profit and deductions from the starting price, we recalculated the indirect selling expenses incurred by Camesa's U.S. affiliate, based on the affiliate's 2002 income statement. *See* Memorandum from Jim Kemp, Import Compliance Specialist, to Constance Handley, Program Manager, Re: Analysis Memorandum for Aceros Camesa S.A. de C.V., dated July 10, 2003.

Normal Value

A. Selection of Comparison Markets

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate), that the time of the sales reasonably corresponds to the time of the sale used to determine EP or CEP, and that there is no particular market situation that prevents a proper comparison with the EP or CEP. The statute contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

We found that Camesa had a viable home market for PC strand. As such, Camesa submitted home market sales data for purposes of the calculation of NV.

In deriving NV, we made adjustments as detailed in the *Calculation of Normal Value Based on Home Market Prices* section, below.

B. Cost of Production Analysis

Based on allegations contained in the petition, and in accordance with section 773(b)(2)(A)(i) of the Act, we found reasonable grounds to believe or suspect that PC strand sales were made in Mexico at prices below the cost of production (COP). *See Initiation Notice*, 68 FR 9050. As a result, the Department has conducted an investigation to determine whether Camesa made home market sales at prices below their respective COPs during the POI within the meaning of section 773(b) of the Act.

We conducted the COP analysis described below.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated a weighted-average COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for the home market G&A expenses, including interest expenses, and packing expenses. We relied on the COP data submitted by Camesa in its cost questionnaire response, except for an adjustment to the calculation of Camesa's interest expense ratio to include net foreign exchange gains and losses and exclude monetary position gain. *See* Memorandum from Margaret Pusey, Accountant, to Neal M. Halper, Director, Office of Accounting, Re: Cost of Production Calculation Adjustments for the Preliminary Determination, dated July 10, 2003.

2. Test of Home Market Sales Prices

We compared the adjusted weighted-average COP for Camesa to its home-market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP within an extended period of time (*i.e.*, a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time.

On a model-specific basis, we compared the revised COP to the home market prices, less any applicable movement charges, discounts, rebates, and direct and indirect selling expenses (which were also deducted from COP).

3. Results of the COP Test

Pursuant to section 773(b) of the Act, which provides that sales made below COP may be disregarded only if, among other things, they are made in ''substantial quantities'' (*i.e.* 20 percent or more of a respondent's sales of a given product), we did not disregard any below-cost sales because we determined that the below-cost sales were not made in ''substantial quantities.'' As this was the case for all products sold in the home market, we did not disregard any sales as below-cost.

C. Calculation of Normal Value Based on Home Market Prices

We determined NV for Camesa as follows. We made adjustments for any differences in packing and deducted home market movement expenses pursuant to sections 773(a)(6)(A) and 773(a)(6)(B)(ii) of the Act. In addition, where applicable in comparison to EP transactions, we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act.

We made COS adjustments for Camesa's EP transactions by deducting direct selling expenses incurred for home market sales (credit expenses) and adding U.S. direct selling expenses (credit expenses).

D. Level of Trade/Constructed Export Price Offset

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the EP or CEP transaction. The NV level of trade is that of the starting-price sales in the comparison market. For EP sales, the U.S. level of trade is also the level of the starting-price sale, which is usually from exporter to importer. For CEP transactions, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different level of trade than EP or CEP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act.

In implementing these principles in this investigation, we obtained information from Camesa about the marketing stages involved in the reported U.S. and home market sales, including a description of the selling activities performed by the respondent for each channel of distribution. In identifying levels of trade for EP and home market sales we considered the selling functions reflected in the starting price before any adjustments. For CEP sales, we considered only the selling activities reflected in the price after the deduction of expenses pursuant to section 772(d) of the Act.

In conducting our level-of-trade analysis for Camesa, we examined the specific types of customers, the channels of distribution, and the selling practices of the respondent. Generally, if the reported levels of trade are the same, the functions and activities of the seller should be similar. Conversely, if a party reports levels of trade that are different for different categories of sales, the functions and activities may be dissimilar. We found the following.

Camesa has reported one channel of distribution in the home market, (1) sales to unaffiliated end users and distributors, and three channels of distribution in the U.S. market, (2) EP sales to unaffiliated end users, (3) CEP sales through an affiliated importer to unaffiliated end users, and (4) CEP sales through an affiliated importer to unaffiliated resellers. Camesa has reported two customer categories in the home market, (1) distributors and (2) direct customers. The company performed the same selling functions for all home market customers, and, therefore, has only one level of trade in the home market. Camesa has reported two customer categories in the U.S. market, (1) trading companies and (2) direct customers. In the U.S. market all of the EP sales were sold to direct customers. In comparing EP sales to home market sales, we found that the selling functions performed by Camesa for its different customers and channels of distribution were very similar in each market. Therefore, we concluded that the EP and home market levels of trade were the same.

With regard to the U.S. sales through an affiliated importer, which were all CEP sales, we considered only the selling activities reflected in the price after the deduction of expenses and profit covered in section 772(d) of the Act. For home market sales, Camesa provided selling functions such as sales processing, credit and collections, inventory, and freight. We found that for CEP sales, except for credit and collections, Camesa provided the same services with the addition of packing and documentation for export. Based on the similarities of selling functions provided by Camesa in both markets, we have determined that the CEP sales are made at the same level of trade as the home market sales. Therefore, we find it unnecessary to make any LOT or CEP adjustments.

Currency Conversions

We made currency conversions into U.S. dollars in accordance with section 773A of the Act based on exchange rates in effect on the dates of the U.S. sale, as obtained from the Federal Reserve Bank (the Department's preferred source for exchange rates).

Critical Circumstances

On June 17, 2003, the petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigations of PC strand

from Mexico. In accordance with 19 CFR 351.206(c)(2)(i), because petitioners submitted critical circumstances allegations more than 20 days before the scheduled date of the preliminary determination, the Department must issue preliminary critical circumstances determinations not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

According to 19 CFR 351.206(h)(1), in determining whether imports of the subject merchandise have been ''massive,'' the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that ''unless the imports during a 'relatively short period' have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.''

In accordance with 19 CFR 351.206(i), the Department defines ''relatively short period'' as generally the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later. This section further provides that, if the Department finds that importers, exporters or producers had reason to believe at some time prior to the filing of the petition that a proceeding was likely, then the Department may consider a period of not less than three months from that earlier time.

In determining whether the above statutory criteria have been satisfied, we examined: (1) The evidence presented in the petitioners' submission of June 17, 2003; (2) exporter-specific shipment data requested by the Department; (3) evidence obtained since the initiation of the LTFV investigation (*i.e.*, additional import statistics released by the Census Bureau); and (4) the ITC preliminary injury determination.

To determine whether a history of dumping and material injury exists, the Department generally considers current or previous antidumping duty orders on the subject merchandise from the country in question in the United States and current orders in any other country. The Department will normally not consider the initiation of a case, or a preliminary or final determination of sales at LTFV in the absence of an affirmative finding of material injury by the ITC, as indicative of a history sufficient to satisfy this criterion. *See Preliminary Determination of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova*, 65 FR 70696 (November 27, 2000). With regard to imports of PC strand from Mexico, the petitioners make no specific mention of a history of dumping. We are not aware of any antidumping order in the United States or elsewhere on PC strand from Mexico. For this reason, the Department does not find a history of injurious dumping of the subject merchandise from Mexico pursuant to section 733(e)(1)(A)(i) of the Act.

In determining whether there is a reasonable basis to believe or suspect that an importer knew or should have known that the exporter was selling PC strand at LTFV, the Department must rely on the facts before it at the time the determination is made. The Department normally considers margins of 25 percent or more for EP sales and 15 percent or more for CEP sales sufficient to impute knowledge of dumping. *See e.g., Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 62 FR 31972, 31978 (June 11, 1997). The Department generally bases its decision, with respect to knowledge, on the margins calculated in the preliminary determination. Because the preliminary dumping margins for the respondents are greater than 25 percent, we find there is a reasonable basis to impute knowledge of dumping with respect to these imports from Mexico.

In determining whether there is a reasonable basis to believe or suspect that an importer knew or should have known that there was likely to be material injury by reason of dumped imports, the Department normally will look to the preliminary injury determination of the ITC. If the ITC finds a reasonable indication of present material injury to the relevant U.S. industry, the Department will determine that a reasonable basis exists to impute importer knowledge that material injury is likely by reason of dumped imports. *See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 FR 61964 (November 20, 1997). In this case, the ITC preliminarily found that there is material injury to the United States by reason of imports of subject merchandise from Brazil, India, Mexico, the Republic of Korea, and Thailand. *See Determinations and Views of the Commission*, USITC Publication No. 3589, March 2003. Therefore, we preliminarily find that there is a reasonable basis to believe or suspect that Mexican importers knew or should have known that dumped imports of PC strand from these countries were likely to cause material injury. *See Preliminary Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 FR 31972 (June 11, 1997); *Preliminary Determination of Sales at Less Than Fair Value, Certain Cut-to-Length Carbon Steel Plate from the Russian Federation*, 62 FR 31967 (June 11, 1997); *Preliminary Determination of Sales at Less Than Fair Value, Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 31958 (June 11, 1997).

In determining whether there are ''massive imports'' over a ''relatively short period,'' pursuant to section 733(e)(1)(B) of the Tariff Act, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.*, the ''base period'') to a comparable period of at least three months following the filing of the petition (*i.e.*, the ''comparison period''). However, as stated at 19 CFR 351.206(i), if the Secretary finds importers, exporters, or producers had reason to believe at some time prior to the beginning of the proceeding that a proceeding was likely, then the Secretary may consider a time period of not less than three months from that earlier time. Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.

In accordance with 19 CFR 351.206(i), the comparison period must be at least three months; however, if we determine that importers, or exporters or producers, had reason to believe that a proceeding was likely, then the Department may consider a longer period. The Department requested and obtained from both Camesa and Cablesa monthly shipment data for 2001, 2002, and January through June 2003. In addition, we obtained U.S. import data

for PC strand through April 2003, as reported on the ITC's DataWeb site. Due to our application of total AFA to Cablesa, we relied on U.S. import data provided by BCBP to conduct our surge analysis. Since this import information is only currently available through the end of April 2003, we have decided that three-month base periods and three-month comparison periods are the most appropriate. Therefore, we have concluded that the comparison period should be February 2003 to April 2003, while the base period should be November 2002 to January 2003.

Pursuant to 19 CFR 351.206(h), we will not consider imports to be massive unless imports in the comparison period have increased by at least 15 percent over imports in the base period. For Camesa, we found the volume of shipments of PC strand increased by less than 15 percent; for Cablesa, according to import information obtained from BCBP, we found the volume of shipments of PC strand increased by more than 15 percent. We therefore find that imports of subject merchandise were massive in the comparison period for Cablesa, but not for Camesa. *See* Memorandum from Salim Bhabrawla and Carol Henninger, International Trade Compliance Analysts, to Constance Handley, Program Manager, Re: Antidumping Duty Investigation of Prestressed Concrete Steel Wire Strand from Mexico and Thailand—Preliminary Affirmative and Negative Determinations of Critical Circumstances (Critical Circumstances Memo), dated July 10, 2003.

It is also the Department's practice to conduct its critical circumstances analysis of companies in the ''All Others'' category based on the experience of the investigated companies. Because we are determining that critical circumstances did not exist for Camesa, and Camesa is the only respondent that has received a margin not based on AFA in this investigation, we are concluding that critical circumstances did not exist for companies covered by the ''All Others'' rate.

In summary, we find there is a reasonable basis to believe or suspect importers had knowledge of dumping and the likelihood of material injury with respect to PC strand from Mexico. We further find there have been massive imports of PC strand over a relatively short period from respondent Cablesa. However, imports from Camesa have been found to be not massive over a relatively short period. In addition, we find that imports of PC strand have not been massive over a relatively short period from companies covered by the ''All-Other'' rate. Given the analysis summarized above, and described in more detail in the Critical Circumstances Memo, we preliminarily determine critical circumstances exist for imports of PC strand produced and exported by Cablesa.

In accordance with section 733(e)(2) of the Act, upon issuance of an affirmative preliminary determination of sales at LTFV in the investigation with respect to PC strand produced and exported by Cablesa, the Department will direct the BCBP to suspend liquidation of all entries of PC strand from Mexico that are entered, or withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication in the **Federal Register** of our preliminary determination in this investigation. BCBP shall require a cash deposit or posting of a bond equal to the estimated preliminary dumping margins reflected in the preliminary determinations published in the **Federal Register**. The suspension of liquidation to be issued after our preliminary determination will remain in effect until further notice. We will make a final determination concerning critical circumstances for all producers and exporters of subject merchandise from Mexico when we make our final determinations in this investigation, which will be 135 days after the date of publication of the preliminary determination.

Verification

In accordance with section 782(i) of the Act, we intend to verify all information relied upon in making our final determination for Camesa. Verification of Cablesa's data is contingent upon the sufficiency of the company's response to our July 10, 2003, request, and any subsequent requests, for additional information.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing the BCBP to suspend liquidation of all entries of PC strand from Mexico, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Additionally, for Cablesa, we are instructing the BCBP to suspend liquidation of entries made on or after 90 days prior to the publication of this notice. We are also instructing the BCBP to require a cash deposit or the posting of a bond equal to the weighted-average dumping margin as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

The weighted-average dumping margins are provided below:

Producer/exporter	Weighted-average margin (percentage)
Aceros Camesa S.A. de C.V ...	57.64
Cablesa S.A. de C.V	77.20
All Others	57.64

Disclosure

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties in this proceeding in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the final determination in this proceeding is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of PC strand from Mexico are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs on the later of 50 days after the date of publication of this notice or one week after the issuance of the verification reports. *See* 19 CFR 351.309(c)(1)(i). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days after the deadline for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we will tentatively hold the hearing two days after the deadline for submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined.

Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310(c). The Department will make its final determination no later than 135 days after the date of publication of this preliminary determination.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: July 10, 2003.

Jeffrey May,

Acting Assistant Secretary for Grant Aldonas, Under Secretary.

[FR Doc. 03–18130 Filed 7–16–03; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A-351–837]

Notice of Preliminary Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Wire Strand from Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Determination of Sales at Less Than Fair Value.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: David Layton at (202) 482–0371, or Monica Gallardo at (202) 482–3147; AD/CVD Enforcement Office V, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that prestressed concrete steel wire strand (PC strand) from Brazil is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The preliminary margin assigned to Belgo Bekaert Arames, S.A. (BBA) is based on adverse facts available (AFA). The estimated margin of sales at LTFV is shown in the *Suspension of Liquidation* section of this notice.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 75 days after the date of this preliminary determination.

Case History

This investigation was initiated on February 20, 2003.[1] *See Notice of Initiation of Antidumping Duty Investigations: Prestressed Concrete Steel Wire Strand From Brazil, India, the Republic of Korea, Mexico, and Thailand*, 68 FR 9050 (February 27, 2003) (*Initiation Notice*). Since the initiation of the investigation, the following events have occurred:

The Department of Commerce (the Department) set aside a period for all interested parties to raise issues regarding product coverage. *See Initiation Notice*, 68 FR at 9050. No comments were received from interested parties in this investigation.

The Department issued a letter on March 7, 2003, to interested parties in all of the concurrent PC strand antidumping investigations, providing an opportunity to comment on the Department's proposed model match characteristics and its hierarchy of characteristics. The petitioners submitted comments on March 18 and March 20, 2003. The Department also received comments on model matching from respondents in the concurrent investigation involving Mexico on March 18, 2003. These comments were taken into consideration by the Department in developing the model matching characteristics and hierarchy for all of the PC strand antidumping investigations.

On March 17, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of the products subject to this investigation are materially injuring an industry in the United States producing the domestic like product. *See Prestressed Concrete Steel Wire Strand From Brazil, India, Korea, Mexico, and Thailand*, 68 FR 13952 (March 21, 2003).

On April 4, 2003, the Department issued its antidumping questionnaire to the Brazilian respondent, BBA, specifying, that the response to section A would be due on April 25, 2003, and that the responses to sections B, C, and D would be due May 12, 2003[2]. On April 28, 2003, BBA confirmed that it would not participate in the investigation. *See* Memorandum from David Layton, International Trade Compliance Analyst, to the File, Re: Telephone Conversation with Counsel for Brazilian Producer Belgo Bekaert Arames S.A. Concerning Participation, dated April 28, 2003. BBA provided no further elaboration, nor did it suggest alternatives to meet the Department's requirements pursuant to 782(c) of the Act. *Id.*

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producers/exporters of subject merchandise, section 777A(c)(2) of the Act permits the Department to investigate either: (1) a sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined.

During the period of investigation (POI), only BBA was identified as a producer /exporter of subject merchandise from Brazil. In an April 1, 2003, conversation with counsel to BBA, it was confirmed that BBA is the sole producer of PC strand in Brazil and that BBA is a subsidiary of the Companhia Siderurgica Belgo-Mineira (Belgo-Mineira) which holds majority shares in BBA. *See* Memorandum from David Layton, International Trade Compliance Analyst, to the File dated April 1, 2003. Therefore, we selected BBA as the sole respondent in the investigation of PC strand from Brazil. *See* Memorandum from Daniel O'Brien, Import Compliance Specialist, to Gary Taverman, Director, Office 5, RE:

[1] The petitioners in this investigation are American Spring Wire Corp., Insteel Wire Products Company, and Sumiden Wire Products Corp.

[2] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

Selection of Respondents, dated April 4, 2003.

Period of Investigation

The period of investigation (POI) is January 1, 2002, through December 31, 2002. This period corresponds to the four most recent fiscal quarters prior to the month of filing of the petition (*i.e.*, January, 2003) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

For purposes of this investigation, PC strand is steel strand produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.

The merchandise under investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Facts Available

For the reasons discussed below, we determine that the use of AFA is appropriate for the preliminary determination with respect to BBA.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

As discussed above, BBA failed to respond to the Department's request for information, thus the curative provisions of sections 782(d) and (e) of the Act are not applicable. Specifically, the information that BBA failed to report is critical for calculating preliminary dumping margins, therefore, the Department must resort to facts otherwise available to ensure that BBA does not obtain a more favorable result than it would by responding to the Department's request for information. The failure of BBA to respond significantly impedes this process because the Department cannot accurately determine a margin for this party. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we have based BBA's margin rate on facts available.

B. Application of Adverse Inferences for Facts Available

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 870 (1994) (SAA). Furthermore, ''{a}ffirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997). In this case, BBA has failed to cooperate to the best of its ability by failing to respond to the Department's antidumping questionnaire. In addition, the company did not make an effort to provide an explanation for its failure to respond, or proposed an alternate form of submitting the required data. These omissions constitute a failure on the part of this company to cooperate ''to the best of its ability to comply with a request for information'' by the Department within the meaning of section 776 of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985, 42986 (July 12, 2000) (the Department applied total AFA where respondent failed to respond to the antidumping questionnaires).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. *See also* 19 CFR 351.308(c); SAA at 829–831. In this case, because we are unable to calculate margins for the respondent in this investigation, we assign to BBA the highest margin from the proceeding, which is the highest margin alleged for Brazil in the petition. *See Initiation Notice*, 68 FR at 9052.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition) in using facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* 19 CFR 351.308(d); *see also* SAA at 870.

To assess the reliability of the petition margin for the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition for both this preliminary determination and during our pre-initiation analysis. *See* Office of AD/CVD Enforcement Initiation Checklist, at 15 (February 20, 2003)

(Initiation Checklist). Also, as discussed below, we examined evidence supporting the calculations in the petition to determine the probative value of the margins in the petition for use as AFA for purposes of this preliminary determination. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the constructed export price (CEP) and normal value (NV) calculations on which the margin in the petition was based. *See* Memorandum from David Layton and Monica Gallardo, International Trade Compliance Analysts, to Gary Taverman, Director, Office 5, Re: Corroboration of Data Contained in the Petition for Assigning Facts Available Rates, dated July 10, 2003 (Corroboration Memo).

1. Corroboration of Constructed Export Price

The petitioners based CEP on prices for sales of low-relaxation PC strand from a Brazilian producer, through its U.S. affiliate, to an unaffiliated U.S. purchaser. The petitioners calculated a single average gross unit price and deducted from it estimated costs for international freight and insurance charges, U.S. inland freight charges, harbor maintenance and merchandise processing fees, imputed credit expenses, and trading company commission to arrive at an average net U.S. price. Information regarding U.S. prices including warehousing expenses, indirect selling expenses, inventory carrying expenses, and CEP profit was not reasonably available to the petitioners. Therefore, the petitioners did not deduct these items from the average gross unit price. Instead, as a conservative estimate of these expenses, the petitioners subtracted an amount for the ''prevailing commission rate for PC strand sold in the United States via unaffiliated agents to foreign producers' unaffiliated U.S. customers.'' *See* Volume II-Brazil AD of the petition at 2–3. We compared the U.S. market price quotes with official U.S. import statistics and U.S. customs data, and found the prices used by the petitioners to be reliable. For further discussion, see Corroboration Memo at 2.

2. Corroboration of Normal Value

With respect to the NV, the petitioners provided a home market price for low-relaxation PC strand that was obtained from foreign market research. *See* Memorandum to the File, Re: Telephone Conversation with Market Researcher Regarding the Petitions for Imposition of Antidumping: Prestressed Concrete Steel Wire Strand from Brazil (February 12, 2003). The petitioners adjusted the gross unit price for home market credit expenses and inland freight.

The Department was provided with no useful information by the respondent or other interested parties and is aware of no other independent source of information that would enable it to further corroborate the margin calculations in the petition. Specifically, we attempted to locate both home market prices through publicly available sources and U.S. producer costs upon which the CV was based, but we were unable to do so. *See* Corroboration Memo at 3.

The implementing regulation for section 776 of the Act, at 19 CFR 351.308(d) states, ''{t}he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.'' Additionally, we note that the SAA at 870 specifically states that, where ''corroboration may not be practicable in a given circumstance,'' the Department need not ''prove that the facts available are the best alternative.''

Therefore, based on our efforts, described above, to corroborate information contained in the petition, and in accordance with section 776(c) of the Act, we consider the margins in the petition to be corroborated to the extent practicable for purposes of this preliminary determination. Accordingly, in selecting AFA with respect to BBA, we have applied the margin rate of 118.75 percent, which is the highest estimated dumping margin set forth in the notice of initiation. *See Initiation Notice*, 68 FR at 9052.

All Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted-averaged dumping margins established for all exporters and producers individually investigated are zero or *de minimis* or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated. This provision contemplates that we weight-average margins other than zero, *de minimis*, and facts available margins to establish that ''All Others'' rate. Where the data do not permit weight-averaging such rates, the SAA provides that we use other reasonable methods. *See* SAA at 873. Because the revised petition, contained only one price-to-price dumping margin, it is reasonable to use this dumping margin to create an ''All Others'' rate. Further, since BBA is the only known Brazilian producer/exporter of subject merchandise, it is reasonable to use a margin based on a comparison of its sales as the ''All Others'' rate. Accordingly, we have applied a margin of 118.75 percent as the ''All Others'' rate.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing the U.S. Bureau of Customs and Border Protection (BCBP) to suspend liquidation of all entries of PC strand from Brazil that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We are also instructing the BCBP to require a cash deposit or the posting of a bond equal to the dumping margin as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

The dumping margins are as follows:

Producer/Exporter	Margin (Percentage)
Belgo Bekaert Arames S.A	118.75
All Others	118.75

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the final determination in this proceeding is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of PC strand from Brazil are materially injuring, or threaten material injury, to the U.S. industry.

Public Comment

Interested parties are invited to comment on the preliminary

determination. Interested parties may submit case briefs within 30 days of the date of publication of this notice. *See* 19 CFR 351.309(c)(1)(I). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days after the deadline for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we will tentatively hold the hearing two days after the deadline for submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310(c). The Department will make its final determination no later than 75 days after the date of publication of this preliminary determination.

This determination is issued and published in accordance with sections 733(f) and 777(I)(1) of the Act.

Dated: July 10, 2003.

Jeffrey May,

Acting Assistant Secretary for Grant Aldonas, Under Secretary.

[FR Doc. 03–18131 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–828]

Notice of Preliminary Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Wire Strand From India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Determination of Sales at Less Than Fair Value.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Tisha Loeper-Viti at (202) 482–7425, or Martin Claessens at (202) 482–5451; AD/CVD Enforcement Office V, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that prestressed concrete steel wire strand (PC strand) from India is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The preliminary margin assigned to Tata Iron and Steel Co. Ltd. is based on adverse facts available (AFA). The estimated margin of sales at LTFV is shown in the *Suspension of Liquidation* section of this notice.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 75 days after the date of this preliminary determination.

Case History

This investigation was initiated on February 20, 2003.[1] *See Notice of Initiation of Antidumping Duty Investigations: Prestressed Concrete Steel Wire Strand From Brazil, India, the Republic of Korea, Mexico, and Thailand,* 68 FR 9050 (February 27, 2003) (*Initiation Notice*). Since the initiation of the investigation, the following events have occurred:

The U.S. Department of Commerce (the Department) set aside a period for all interested parties to raise issues regarding product coverage. *See Initiation Notice,* 68 FR at 9050. No comments were received from interested parties in this investigation.

The Department issued a letter on March 7, 2003, to interested parties in all of the concurrent PC strand antidumping investigations, providing an opportunity to comment on the Department's proposed model match characteristics and its hierarchy of characteristics. The petitioners submitted comments on March 18 and 20, 2003. The Department also received comments on model matching from respondents in the concurrent investigation involving Mexico on March 18, 2003. These comments were taken into consideration by the Department in developing the model matching characteristics and hierarchy for all of the PC strand antidumping investigations.

On March 17, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of the products subject to this investigation are materially injuring an industry in the United States producing the domestic like product. *See Prestressed Concrete Steel Wire Strand From Brazil, India, Korea, Mexico, and Thailand,* 68 FR 13952 (March 21, 2003).

On April 4, 2003, the Department issued its antidumping questionnaire to Tata SSL Ltd.[2] The Department was subsequently informed that Tata SSL Ltd. had been retroactively amalgamated with Tata Iron and Steel Co. Ltd. (TISCO) and was now known as TISCO (Wire Division).[3] We received responses to Sections A–D of the antidumping questionnaire from TISCO and issued it supplementary questionnaires where appropriate. TISCO failed to respond to the Department's second supplemental Section D questionnaire, issued on July 1, 2003, in which the Department

[1] The petitioners in this investigation are American Spring Wire Corp., Insteel Wire Products Company, and Sumiden Wire Products Corp.

[2] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

[3] On May 3, 2003, the respondent notified the Department that under a ''Scheme of Amalgamation,'' Tata SSL Ltd. and Tata Iron and Steel Co. Ltd. were united as a single company, with Tata SSL Ltd. becoming known as Tata Iron and Steel Co. Ltd. (Wire Division). This amalgamation was approved by the High Court of Judicature at Bombay on April 21, 2003 with an effective date retroactive to April 1, 2002.

requested detailed information and supporting documentation regarding the company's costs of production. (*See, Facts Available* section of this notice for a discussion as to why TISCO's Section D response was deemed unuseable for this preliminary determination.)

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producers/exporters of subject merchandise, section 777A(c)(2) of the Act permits the Department to investigate either: (1) A sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined.

In the petition, the petitioners identified five producers of PC strand in India. We examined company-specific export data obtained from the U.S. Bureau of Customs and Border Protection (BCBP), the *Iron and Steel Works of the World* (14th ed.), and the Tata Group's websites which indicate that Tata SSL is the only producer of the subject merchandise within the Tata Group during the period of investigation (POI). Furthermore, we have no evidence suggesting that any other Indian company is exporting PC strand to the United States. *See* memorandum from Daniel O'Brien, International Trade Compliance Analyst, to Gary Taverman, Director, Office 5, Re: Selection of Respondents, dated April 4, 2003.

Period of Investigation

The POI is January 1, 2002, through December 31, 2002. This period corresponds to the four most recent fiscal quarters prior to the month of filing of the petition (*i.e.,* January, 2003) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

For purposes of this investigation, PC strand is steel strand produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.

The merchandise under investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Facts Available

For the reasons discussed below, we determine that the use of adverse facts available is appropriate for the preliminary determination with respect to TISCO.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to section 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In this case, TISCO has failed to provide pertinent information requested by the Department necessary to properly calculate an antidumping margin for its preliminary determination. Specifically, TISCO failed to provide the requested detailed cost of manufacturing information for the steel wire rod input used to produce the subject merchandise. In addition, TISCO failed to provide the following requested information, all of which was pertinent to the Department's calculations: (1) A description of the steel making and wire rod production facilities' normal cost accounting system and how it is used to record, classify, aggregate, and allocate the costs incurred to produce different grades and dimension of products; (2) a description of the level of product specificity over which the steel making and wire rod production facilities' cost accounting system normally captures production costs; (3) an explanation of how the product specific costs recorded in the steel making and wire rod production facilities' normal accounting system compare to the reported cost data; (4) a listing and description of all differences between costs computed under respondents normal steel making and wire rod production cost and financial accounting systems and the reported costs, including an explanation of why it was necessary to depart from respondent's normal accounting practices in order to compute the submitted COP and constructed value (CV) figures; (5) an indication of whether its steel making and wire rod facilities utilized inputs obtained from affiliated suppliers; (6) a description of the company's steel making and wire rod production facilities; and (7) a copy of either the audited financial statements for the year ended March 31, 2003, or if not yet available, a copy of the draft financial statements for the same period. The cost of steel wire rod constitutes a significant percentage of the total cost of manufacturing the subject merchandise, and detailed information on the steelmaking and rolling stages of the wire rod production process is critical for the Department to analyze adequately the reported cost information. As a result of TISCO's failure to provide the above requested information, the Department is unable to use the reported steel wire rod cost of manufacturing data. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we have based TISCO's margin rate on facts available.

B. Application of Adverse Inferences for Facts Available

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316,

at 870 (1994) (SAA). Furthermore, ''{affirmative} evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Countervailing Duties: Final Rule,* 62 FR 27296, 27340 (May 19, 1997).

In this case, TISCO has failed to timely provide a complete and useable response to the Department's Section D questionnaires, which included two supplemental questionnaires. The original questionnaire was issued on April 4, 2003, to which TISCO submitted its Section D response on May 27, 2003. In order to address the deficiencies in TISCO's response, the Department issued the first supplemental Section D questionnaire on June 6, 2003. TISCO's response was received on June 24 and 25, 2003. On July 1, 2003, the Department issued the second supplemental section D questionnaire, once again requesting detailed cost of manufacturing information for the steel wire rod input used to produce the subject merchandise, in addition to numerous other important methodological inquires. In this questionnaire we noted that in its previous submission, TISCO failed to provide the requested detailed cost of manufacturing for the steel wire rod used to produce the subject merchandise, and that this information is necessary for the Department to analyze adequately the response.

We established July 7, 2003, as the due date for the second supplemental section D questionnaire in order to allow the Department adequate time to analyze the response and to incorporate it into the calculation of the dumping margin for the preliminary determination. TISCO, however, having been informed of the importance of the requested information for the Department's analysis, failed to respond, even after the Department had granted it another extension of the deadline, *i.e.*, until July 9, 2003. TISCO's failure to provide this critical information in a timely manner has rendered its entire submission inadequate and unusable for the preliminary determination. This constitutes a failure on the part of this company to cooperate ''to the best of its ability to comply with a request for information'' by the Department within the meaning of section 776 of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan,* 65 FR 42985, 42986 (July 12, 2000) (the Department applied total AFA where respondent failed to respond to the antidumping questionnaires).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. *See also* 19 CFR 351.308(c); SAA at 829–831. In this case, because we are unable to calculate a margin based on TISCO's own data and because an adverse inference is warranted, we assign to TISCO the highest margin from the proceeding, which is the highest margin alleged for India in the petition, as recalculated in the initiation and described in detail below. *See Initiation Notice,* 68 FR at 9052.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition), it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* 19 CFR 351.308(d); *see also* SAA at 870.

To assess the reliability of the petition margin for the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition for both this preliminary determination and during our pre-initiation analysis. *See* Office of AD/CVD Enforcement Initiation Checklist, at 15 (February 20, 2003) (Initiation Checklist). Also, as discussed below, we examined evidence supporting the calculations in the petition to determine the probative value of the margins in the petition for use as AFA for purposes of this preliminary determination. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the constructed export price (CEP) and normal value (NV) calculations on which the margins in the petition were based. *See* Memorandum from Martin Claessens, International Trade Compliance Analyst, to Gary Taverman, Director, Office 5, Re: Corroboration of Data Contained in the Petition for Assigning Facts Available Rates, dated July 10, 2003 (Corroboration Memo).

1. Corroboration of Constructed Export Price

The petitioners based CEP on prices for sales of PC strand from an Indian producer, through its U.S. affiliate, to an unaffiliated U.S. purchaser. The petitioners calculated U.S. price by subtracting imputed credit expenses, international freight and insurance, U.S. merchandise processing and harbor maintenance fees, and U.S. inland freight. The petitioners also subtracted an amount for commissions.

We compared the U.S. market price quotes with official U.S. import statistics and U.S. customs data, and found the prices used by the petitioners to be reliable.

2. Corroboration of Normal Value

With respect to the NV, the petitioners provided a home market price for low-relaxation PC strand that was obtained from foreign market research. *See* Memorandum to the File Re: Telephone Conversation with Market Researcher Regarding the Petitions for Imposition of Antidumping: Prestressed Concrete Steel Wire Strand from India, dated February 7, 2003. To calculate the NV, the petitioners deducted imputed credit expenses and inland freight from the home market prices.

The petitioners also provided information demonstrating reasonable grounds to believe or suspect that sales of PC strand in the home market were made at prices below the fully absorbed cost of production (COP), within the meaning of section 773(b) of the Act, and requested that the Department conduct a country-wide sales-below-cost investigation.

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (COM), selling, general, and administrative (SG&A) expenses, financial expenses, and packing expenses. The petitioners calculated COM based on their own production experience, adjusted for known differences between costs incurred to produce PC strand products in the United States and India using publicly available data. To calculate SG&A, the petitioners relied upon amounts

reported in the March 31, 2002 financial statements of Tata SSL Ltd. To calculate interest expense, the petitioners relied upon the March 31, 2002 financial statements of TISCO. Based upon a comparison of the price of the foreign like product in the home market to the calculated COP of the product, we found reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department initiated a country-wide cost investigation. For initiation purposes and for the purposes of this preliminary determination, we recalculated the labor costs by first indexing the costs in the foreign denominated currency and then converting the costs to U.S. dollars based on the prevailing exchange rate for the comparison period. In addition, we adjusted the petitioners' COP and CV calculations to be based on the currency rates from the Import Administration website rather than on Federal Reserve Bank currency rates. Finally, we have recalculated G&A and interest to remove allocations of certain expenses between COM and SG&A. To be conservative, we have reclassified all amounts where allocations were made, as COM. *See* Initiation Checklist at 14 and Attachments II, III, IV, V and VI.

Pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, the petitioners based NV on CV. The petitioners calculated CV using the same COM, SG&A and interest expense figures used to compute the India home market costs. Consistent with 773(e)(2) of the Act, the petitioners included in CV an amount for profit. For profit, the petitioners relied upon amounts reported in Tata SSL Ltd.''s March 31, 2002 financial statements.

The implementing regulation for section 776 of the Act, at 19 CFR 351.308(d), states, ''[t]he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.'' Additionally, we note that the SAA at 870 specifically states that, where ''corroboration may not be practicable in a given circumstance,'' the Department need not ''prove that the facts available are the best alternative.'' There are no independent sources for the cost data used to calculated the CV in the petition. Where relevant information was available from TISCO's audited financial statements, that information was used in the calculation of CV.

Therefore, based on our efforts, described above, to corroborate information contained in the petition, and in accordance with section 776(c) of the Act, we consider the margins in the petition to be corroborated to the extent practicable for purposes of this preliminary determination.

Accordingly, in selecting AFA with respect to TISCO, we have applied the margin rate of 102.07 percent, which is the highest estimated dumping margin set forth in the notice of initiation. *See Initiation Notice,* 68 FR at 9052.

D. All Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted-averaged dumping margins established for all exporters and producers individually investigated are zero, *de minimis*, or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated. This provision contemplates that we weight-average margins other than zero, *de minimis*, and facts available margins to establish that ''All Others'' rate. Where the data do not permit weight-averaging such rates, the SAA provides that we use other reasonable methods. *See* SAA at 873. Because the petition contained five estimated dumping margins which we subsequently adjusted in our pre-initiation analysis, we have used these adjusted dumping margins to create an ''All Others'' rate. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Germany,* 68 FR 7980, 7983 (February 19, 2003). Specifically, in this case we have used the simple average of both the price-to-price margin and the price-to-constructed value margin from the initiation notice, which takes into account the Department's pre-initiation adjustments as described above under Normal Value. Therefore, we have calculated a margin of 83.65 percent as the ''All Others'' rate.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing the BCBP to suspend liquidation of all entries of PC strand from India, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We are also instructing the BCBP to require a cash deposit or the posting of a bond equal to the dumping margin as indicated in the chart below, adjusted for export subsidies found in the preliminary determination of the companion countervailing duty investigation. Specifically, consistent with our longstanding practice, where the product under investigation is also subject to a concurrent countervailing duty investigation, we instruct the BCBP to require a cash deposit or posting of a bond equal to the amount by which the normal value exceeds the CEP, as indicated below, less the amount of the countervailing duty determined to constitute an export subsidy. Accordingly, for cash deposit purposes, we are subtracting from TISCO's cash deposit rate that portion of the rate attributable to the export subsidies found in the affirmative countervailing duty determination for this respondent (*i.e.*, 34.99 percent). After the adjustment for the cash deposit rate attributed to export subsidies, the resulting cash deposit rate will be 67.08 for TISCO and 48.66 for ''All Others.'' These instructions suspending liquidation will remain in effect until further notice.

The dumping margins are as follows:

Producer/exporter	Margin (percentage)
Tata Iron and Steel Co. Ltd	102.07
All Others	83.65

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the final determination in this proceeding is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of PC strand from India are materially injuring, or threaten material injury, to the U.S. industry.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs within 30 days of the date of publication of this notice. *See* 19 CFR 351.309(c)(1)(i). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days after the deadline for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we will tentatively hold the hearing two days after the deadline for submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310(c). The Department will make its final determination no later than 75 days after the date of this preliminary determination.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act.

Dated: July 10, 2003.

Jeffrey May,

Acting Assistant Secretary for Grant Aldonas, Under Secretary.

[FR Doc. 03–18132 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–852]

Notice of Preliminary Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Wire Strand From the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Determination of Sales at Less Than Fair Value.

EFFECTIVE DATE: July 17, 2003.

FOR FURTHER INFORMATION CONTACT: Marin Weaver at (202) 482–2336, or Christopher C. Welty at (202) 482–8173; AD/CVD Enforcement Office V, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that prestressed concrete steel wire strand (PC strand) from the Republic of Korea (Korea) is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The preliminary margins assigned to Kiswire Ltd.[1] (Kiswire) and Dong-Il Steel Mfg. Co. Ltd. (Dong-Il) are based on adverse facts available (AFA). The estimated margin of sales at LTFV is shown in the *Suspension of Liquidation* section of this notice.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 75 days after the date of this preliminary determination.

Case History

This investigation was initiated on February 20, 2003.[2] *See Notice of Initiation of Antidumping Duty Investigations: Prestressed Concrete Steel Wire Strand From Brazil, India, the Republic of Korea, Mexico, and Thailand,* 68 FR 9050 (February 27, 2003) (*Initiation Notice*). Since the initiation of the investigation, the following events have occurred:

The U.S. Department of Commerce (the Department) set aside a period for all interested parties to raise issues regarding product coverage. *See Initiation Notice,* 68 FR at 9050. No comments were received from interested parties in this investigation.

The Department issued a letter on March 7, 2003, to interested parties in all of the concurrent PC strand antidumping investigations, providing an opportunity to comment on the Department's proposed model match characteristics and its hierarchy characteristics. The petitioners submitted comments on March 18 and 20, 2003. The Department also received comments on model matching from respondents in the concurrent investigation involving Mexico on March 18, 2003. These comments were taken into consideration by the Department in developing the model matching characteristics and hierarchy for all of the PC strand antidumping investigations.

On March 17, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of the products subject to this investigation are materially injuring an industry in the United States producing the domestic like product. *See Prestressed Concrete Steel Wire Strand From Brazil, India, Korea, Mexico, and Thailand,* 68 FR 13952 (March 21, 2003).

On April 4, 2003, the Department issued its antidumping questionnaire to Kiswire and Dong-Il, specifying that their responses to Section A of the questionnaire would be due on April 25, 2003, and that responses to Sections B-D of the questionnaire would be due May 12, 2003.[3] On April 25, 2003, the Department received a letter from Dong-Il stating that it ''decided not to submit {its} data and information required in {the Department's} questionnaire for this Anti-Dumping case.'' *See* Dong-Il submission dated April 25, 2003. Dong-Il provided no further elaboration, nor did it suggest alternatives to meet the Department's requirements pursuant to 782(c) of the Act. *Id.* On June 5, 2003, the Department sent a letter to Kiswire stating that we had not received its questionnaire response and informing Kiswire, that we had confirmed that it received the original questionnaire. *See* Letter from Department to Kiswire, dated June 5, 2003; *see also,* Memorandum from Christopher C. Welty, International Trade Compliance Analyst, to the File, Re: Federal Express tracking information, dated June 18, 2003. In the letter, the Department also informed Kiswire that its failure to provide the Department with the requested information could result in the use of the facts available and an inference that may be adverse to its interests. The Department did not receive a response from Kiswire to the Department's letter.

[1] In the *Initiation Notice* and the Respondent Selection Memo, the Department refered to Kiswire as Koryo Steel Company and Korean Iron and Steel Works Ltd., respectively. Upon further examination of the relevant record data the Department has determined that Kiswire Ltd. is a more accurate translation of the second largest Korean producer of PC strand.

[2] The petitioners in this investigation are American Spring Wire Corp., Insteel Wire Products Company, and Sumiden Wire Products Corp.

[3] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Section E requests information on further manufacturing.

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producers/exporters of subject merchandise, section 777A(c)(2) of the Act permits the Department to investigate either: (1) A sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined.

Upon consideration of the resources available to the Department, we determined that it was not practicable to examine all known producers/exporters of the subject merchandise. Instead, because there were numerous producers/exporters of subject merchandise during the period of investigation (POI), we examined company-specific export data and U.S. Bureau of Customs and Border Protection (BCBP) import data for the POI and selected as mandatory respondents the two companies that accounted for the majority of subject imports from Korea, Kiswire and Dong-Il. *See* Memorandum from Daniel O'Brien, International Trade Compliance Analyst, to Gary Taverman, Director, Office 5, Re: Selection of Respondents, dated April 4, 2003.

Period of Investigation

The POI is January 1, 2002, through December 31, 2002. This period corresponds to the four most recent fiscal quarters prior to the month of filing of the petition (*i.e.*, January, 2003) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

For purposes of this investigation, PC strand is steel strand produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.

The merchandise under investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Facts Available

For the reasons discussed below, we determine that the use of AFA is appropriate for the preliminary determination with respect to Kiswire and Dong-Il.

A. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

As discussed above, Kiswire and Dong-Il failed to respond to the Department's request for information, thus the curative provisions of sections 782(d) and (e) of the Act are not applicable. Specifically, because the information that Kiswire and Dong-Il failed to report is critical for calculating preliminary dumping margins the Department must resort to facts otherwise available to ensure that Kiswire and Dong-Il do not obtain a more favorable result than they would by responding to the Department's request for information. The failure of Kiswire and Dong-Il to respond significantly impedes this process because the Department cannot accurately determine a margin for these parties. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we have based Kiswire and Dong-Il's margin rate on facts available.

B. Application of Adverse Inferences for Facts Available

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 870 (1994) (SAA). Furthermore, ''{a}ffirmative evidence of bad faith on the part of respondent is not required before the Department may make an adverse inference.'' *See Antidumping Countervailing Duties: Final Rule,* 62 FR 27296, 27340 (May 19, 1997). In this case, Kiswire and Dong-Il have failed to cooperate to the best of their ability by failing to respond to the Department's antidumping questionnaires. In addition, neither company made an effort to provide an explanation for its failure to respond, nor proposed an alternate form of submitting the required data. These omissions constitute a failure on the part of both of these companies to cooperate ''to the best of {their} ability to comply with a request for information'' by the Department within the meaning of section 776 of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan,* 65 FR 42985, 42986 (July 12, 2000) (the Department applied total AFA where respondent failed to respond to the antidumping questionnaires).

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other

information placed on the record. See also 19 CFR 351.308(c); SAA at 829–831. In this case, because we are unable to calculate margins for any of the respondents in this investigation, we assign to Kiswire and Dong-Il the highest margin from the proceeding, which is the highest margin alleged for Korea in the petition, as recalculated in the initiation and described in detail below. *See Initiation Notice,* 68 FR at 9052–53.

When using facts otherwise available, section 776(c) of the Act provides that, when the Department relies on secondary information (such as the petition) in using facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* 19 CFR 351.308(d); *see also* SAA at 870.

To assess the reliability of the petition margin for the purposes of this investigation, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition for both this preliminary determination and during our pre-initiation analysis. *See* Office of AD/CVD Enforcement Initiation Checklist, at 15 (February 20, 2003) (Initiation Checklist). Also, as discussed below, we examined evidence supporting the calculations in the petition to determine the probative value of the margins in the petition for use as AFA for purposes of this preliminary determination. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the export price (EP) and normal value (NV) calculations on which the margins in the petition were based. *See* Memorandum from Christopher C. Welty, International Trade Compliance Analyst, to Gary Taverman, Director Office 5, Re: Corroboration of Data Contained in the Petition for Assigning Facts Available Rates (Corroboration Memo), dated July 10, 2003.

1. Corroboration of Export Price

The petitioners based EP on prices within the POI for sales of PC strand produced by two Korean companies and offered for sale to an unaffiliated U.S. customer. The petitioners averaged the gross prices, by company, and deducted from the average prices international freight and insurance expenses, U.S. customs duties, U.S. harbor maintenance and merchandise processing fees, and the U.S. inland freight expenses.

We compared the U.S. market price quotes with official U.S. import statistics and U.S. customs data, and found the prices used by the petitioners to be reliable. *See* Corroboration Memo at 2.

2. Corroboration of Normal Value

With respect to NV, the petitioners provided home market prices based on prices within the POI for sales of PC strand produced by two Korean companies and offered for sale to an unaffiliated customer in Korea. The price quotes are based on information gathered by a market researcher familiar with the Korean sales. *See* Memorandum to the File Re: Telephone Conversation with Market Researcher Regarding the Petitions for Imposition of Antidumping Duties: Prestressed Concrete Steel Wire Strand from Korea (February 11, 2003). To calculate the NV, the petitioners deducted inland freight from the home market prices and, consistent with our statutory EP circumstances-of-sale calculation methodology, adjusted the home market prices for imputed credit and commissions by deducting home market credit expenses from the home market prices and adding the U.S. imputed credit and U.S. commission expenses to these prices.

The petitioners also provided information demonstrating reasonable grounds to believe or suspect that sales of PC strand in the home market were made at prices below the fully absorbed cost of production (COP), within the meaning of section 773(b) of the Act, and requested that the Department conduct a country-wide sales-below-cost investigation.

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (COM), selling, general, and administrative (SG&A) expenses, financial expenses, and packing expenses. The petitioners calculated COM based on their own production experience, adjusted for known differences between costs incurred to produce PC strand products in the United States and Korea using publicly available data. To calculate SG&A and interest expenses, the petitioners relied upon amounts reported in the 2001 financial statements of Kiswire and Dong-Il. Based upon a comparison of the price of the foreign like product in the home market to the calculated COP of the product, we found reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department initiated a country-wide cost investigation. For initiation purposes and for the purposes of this preliminary determination, we recalculated the labor and electricity costs by first indexing the costs in the foreign denominated currency and then converting the costs to U.S. dollars based on the prevailing exchange rate for the comparison period. In addition, we adjusted the petitioners' COP and constructed value (CV) calculations to be based on the currency rates from the Import Administration website rather than on Federal Reserve Bank currency rates. *See* Initiation Checklist at 16 and Attachments II and III.

Pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, the petitioners based NV for sales in Korea on CV. The petitioners calculated CV using the same COM, SG&A and interest expense figures used to compute the Korean home market costs. Consistent with 773(e)(2) of the Act, the petitioners included in CV an amount for profit. The petitioners based Kiswire's profit ratio on amounts reported in Kiswire's 2001 financial statements. For Dong-Il, no profit margin was calculated because the company was not profitable in either 2001 or 2000.

The Department was provided with no useful information by the respondents or other interested parties and is aware of no other independent source of information that would enable it to further corroborate the margin calculations in the petition. Specifically, we attempted to locate both home market prices through publicly available sources and U.S. producer costs upon which the CV was based, but we were unable to do so. *See* Corroboration Memo at 3 and 4.

The implementing regulation for section 776 of the Act, at 19 CFR 351.308(d) states, ''{t}he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.'' Additionally, we note that the SAA at 870 specifically states that, where ''corroboration may not be practicable in a given circumstance,'' the Department need not ''prove that the facts available are the best alternative.''

Therefore, based on our efforts, described above, to corroborate information contained in the petition,

and in accordance with 776(c) of the Act, we consider the margins in the petition to be corroborated to the extent practicable for purposes of this preliminary determination.

Accordingly, in selecting AFA with respect to Kiswire and Dong-Il, we have applied the margin rate of 54.19 percent, which is the highest estimated dumping margin set forth in the notice of initiation. *See Initiation Notice*, 68 FR at 9053.

D. All Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted-averaged dumping margins established for all exporters and producers individually investigated are zero, *de minimis*, or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated. This provision contemplates that we weight-average margins other than zero, *de minimis*, and facts available margins to establish that ''All Others'' rate. Where the data do not permit weight-averaging such rates, the SAA provides that we use other reasonable methods. *See* SAA at 873. Because the petition contained four estimated dumping margins which we subsequently adjusted in our pre-initiation analysis, we have used these adjusted dumping margins to create an ''All Others'' rate based on a simple average. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Germany,* 68 FR 7980, 7983 (February 19, 2003). Specifically, in this case we have used the simple average of both the price-to-price margins and the price-to-CV margins from the initiation notice, which takes into account the Department's pre-initiation adjustments to the labor and utility values alleged in the petition. Therefore, we have calculated a margin of 35.64 percent as the ''All Others'' rate.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing the BCBP to suspend liquidation of all entries of PC strand from Korea, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We are also instructing the BCBP to require a cash deposit or the posting of a bond equal to the dumping margin as indicated in the chart below. These instructions suspending liquidation will remain in effect until further notice.

The dumping margins are as follows:

Producer/exporter	Margin (percentage)
Kiswire Ltd	54.19
Dong-Il Steel Mfg. Co. Ltd	54.19
All Others	35.64

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the final determination in this proceeding is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of PC strand from Korea are materially injuring, or threaten material injury, to the U.S. industry.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs within 30 days of the date of publication of this notice. *See* 19 CFR 351.309(c)(1)(i). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days after the deadline for the submission of case briefs. *See* 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we will tentatively hold the hearing two days after the deadline for submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310(c). The Department will make its final determination no later than 75 days after the date of this preliminary determination.

This determination is issued and published in accordance with sections 733(f) and 777(I)(1) of the Act.

Dated: July 10, 2003.

Jeffrey May,

Acting Assistant Secretary for Grant Aldonas, Under Secretary.

[FR Doc. 03–18133 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of initiation of process to revoke Export Trade Certificate of Review No. 01–00005.

SUMMARY: On January 7, 2002, the Secretary of Commerce issued an Export Trade Certificate of Review to Vinex International, Inc. Because this certificate holder has failed to file an annual report as required by law the Department is initiating proceedings to revoke the certificate. This notice summarizes the notification letter sent to Vinex International, Inc.

FOR FURTHER INFORMATION CONTACT: Jeffrey Anspacher, Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (''the Act'') (15 U.S.C. 4011–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III (''the Regulations'') are found at 15 CFR part 325. Pursuant to this authority, a Certificate of Review was issued on January 7, 2002 to Vinex International, Inc.

A certificate holder is required by law (Section 308 of the Act, 15 U.S.C. 4018) to submit to the Department of Commerce annual reports that update financial and other information relating to business activities covered by its certificate. The annual report is due within 45 days after the anniversary date of the issuance of the Certificate of Review (§§ 325.14 (a) and (b) of the Regulations). Failure to submit a

complete annual report may be the basis for revocation. (§§ 325.10(a)(3) and 325.14(c) of the Regulations).

The Department of Commerce sent to Vinex International, Inc., on December 23, 2002, a letter containing annual report questions with a reminder that its annual report was due on February 21, 2003. Additional reminder letters were sent on March 28, 2003 and May 2, 2003. The Department has received no written response to any of these letters.

On July 11, 2003, and in accordance with § 325.10(c)(1) of the Regulations, a letter was sent by certified mail to notify Vinex International, Inc. that the Department was formally initiating the process to revoke its certificate. The letter stated that this action is being taken because of the certificate holder's failure to file an annual report.

In accordance with § 325.10(c)(2) of the Regulations, of the certificate holder has thirty days from the day after its receipt of the notification letter in which to respond. The certificate holder is deemed to have received this letter as of the date on which this notice is published in the **Federal Register**. For good cause shown, the Department of Commerce can, at its discretion, grant a thirty-day extension for a response (§ 325.10(c)(2) of the Regulations).

If the certificate holder decides to respond, it must specifically address the Department's statement in the notification letter that it has failed to file an annual report. It should state in detail why the facts, conduct, or circumstances described in the notification letter are not true, or if they are, why they do not warrant revoking the certificate. If the certificate holder does not respond within the specified period, it will be considered an admission of the statements contained in the notification letter (§ 325.10(c)(2) of the Regulations).

If the answer demonstrates that the material facts are in dispute, the Department of Commerce and the Department of Justice shall, upon request, meet informally with the certificate holder. Either Department may require the certificate holder to provide the documents or information that are necessary to support its contentions (§ 325.10(c)(3) of the Regulations).

The Department shall publish a notice in the **Federal Register** of the revocation or modification or a decision not to revoke or modify (§ 325.10(c)(4) of the Regulations). If there is a determination to revoke a certificate, any person aggrieved by such final decision may appeal the decision by filing an action in an appropriate U.S. district court within 30 days from the date on which the Department's final determination is published in the **Federal Register** (§§ 325.10(c)(4) and 325.11 of the Regulations).

Dated: July 11, 2003.

Jeffrey Anspacher,

Director, Office of Export Trading Company Affairs.

[FR Doc. 03–18061 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of initiation of process to revoke Export Trade Certificate of Review No. 99–00004.

SUMMARY: On November 17, 1999, the Secretary of Commerce issued an Export Trade Certificate of Review to USXT, Inc. Because this certificate holder has failed to file an annual report as required by law the Department is initiating proceedings to revoke the certificate. This notice summarizes the notification letter sent to USXT, Inc.

FOR FURTHER INFORMATION CONTACT: Jeffrey Anspacher, Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (''the Act'') (15 U.S.C. 4011–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III (''the Regulations'') are found at 15 CFR part 325. Pursuant to this authority, a Certificate of Review was issued on November 17, 1999 to USXT, Inc.

A certificate holder is required by law (Section 308 of the Act, 15 U.S.C. 4018) to submit to the Department of Commerce annual reports that update financial and other information relating to business activities covered by its certificate. The annual report is due within 45 days after the anniversary date of the issuance of the Certificate of Review (§§ 325.14(a) and (b) of the Regulations). Failure to submit a complete annual report may be the basis for revocation. (§§ 325.10(a)(3) and 325.14(c) of the Regulations).

The Department of Commerce sent to USXT, Inc., on November 7, 2002, a letter containing annual report questions with a reminder that its annual report was due on January 1, 2003. Additional reminder letters were sent on March 31, 2003 and April 11, 2003. The Department has received no written response to any of these letters.

On May 5, 2003, and in accordance with § 325.10(c)(1) of the Regulations, a letter was sent by certified mail to notify USXT, Inc. that the Department was formally initiating the process to revoke its certificate. The letter stated that this action is being taken because of the certificate holder's failure to file an annual report.

In accordance with § 325.10(c)(2) of the Regulations, the certificate holder has thirty days from the day after its receipt of the notification letter in which to respond. The certificate holder is deemed to have received this letter as of the date on which this notice is published in the **Federal Register**. For good cause shown, the Department of Commerce can, at its discretion, grant a thirty-day extension for a response (§ 325.10(c)(2) of the Regulations).

If the certificate holder decides to respond, it must specifically address the Department's statement in the notification letter that it has failed to file an annual report. It should state in detail why the facts, conduct, or circumstances described in the notification letter are not true, or if they are, why they do not warrant revoking the certificate. If the certificate holder does not respond within the specified period, it will be considered an admission of the statements contained in the notification letter (§ 325.10(c)(2) of the Regulations).

If the answer demonstrates that the material facts are in dispute, the Department of Commerce and the Department of Justice shall, upon request, meet informally with the certificate holder. Either Department may require the certificate holder to provide the documents or information that are necessary to support its contentions (§ 325.10(c)(3) of the Regulations).

The Department shall publish a notice in the **Federal Register** of the revocation or modification or a decision not to revoke or modify (§ 325.10(c)(4) of the Regulations). If there is a determination to revoke a certificate, any person aggrieved by such final decision may appeal the decision by filing an action in an appropriate U.S. district court within 30 days from the date on which the Department's final determination is published in the **Federal Register** (§§ 325.10(c)(4) and 325.11 of the Regulations).

Dated: July 11, 2003.

Jeffrey Anspacher,

Director, Office of Export Trading Company Affairs.

[FR Doc. 03–18062 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Fire Codes: Request for Comments on NFPA Technical Committee Reports

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Fire Protection Association (NFPA) revises existing standards and adopts new standards twice a year. At its November meeting or its May meeting, the NFPA acts on recommendations made by its technical committees.

The purpose of this notice is to request comments on the technical reports that will be presented at NFPA's 2004 May meeting. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

DATES: The National Electrical Code is published in a separate Report on Proposals and is available about July 11, 2003, on the NFPA Web site *http://www.nfpa.org/nec/TheNEC/ROPsROCs/2003ROP/2003ROP.asp.* Comments received on or before October 31, 2003, will be considered by the National Electrical Code Panels before NFPA takes final action on the proposals.

Thirty-one reports are published in the 2004 May Meeting Report on Proposals and will be available on August 1, 2003. Comments received on or before October 10, 2003, will be considered by the respective NFPA Committees before final action is taken on the proposals.

ADDRESSES: The 2004 May Meeting Report on Proposals and the NEC® Report on Proposals are available and downloadable from NFPA's Web site—*http://www.nfpa.org* or by requesting a copy from the NFPA, Fulfillment Center, 11 Tracy Drive, Avon, Massachusetts 02322. Comments on the report should be submitted to Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, P. O. Box 9101, Quincy, Massachusetts 02269–9101.

FOR FURTHER INFORMATION CONTACT: Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–9101, (617) 770–3000.

SUPPLEMENTARY INFORMATION:

Background

The National Fire Protection Association (NFPA) develops building, fire, and electrical safety codes and standards. Federal agencies frequently use these codes and standards as the basis for developing federal regulations concerning fire safety. Often, the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR part 51.

Revisions of existing standards and adoption of new standards are reported by the technical committees at the NFPA's November meeting or at the May meeting each year. The NFPA invites public comment on its Report on Proposals.

Request for Comments

Interested persons may participate in these revisions by submitting written data, views, or arguments to Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–9101. Commenters may use the forms provided for comments in the Reports on Proposals. Each person submitting a comment should include his or her name and address, identify the notice, and give reasons for any recommendations. Comments received on or before October 10, 2003, for the 2004 May Meeting Report on Proposals or October 31, 2003, for the NEC® Report on Proposals will be considered by the NFPA before final action is taken on the proposals.

Copies of all written comments received and the disposition of those comments by the NFPA committees will be published as the 2004 May Meeting Report on Comments by April 2, 2004, or on April 8, 2004, for the NEC® Report on Comments, prior to the May meeting.

A copy of the Report on Comments will be sent automatically to each commenter. Action on the reports of the Technical Committees (adoption or rejection) will be taken at the May meeting, May 23–27, 2004, in Salt Lake City, Utah, by NFPA members.

2004 MAY MEETING REPORT ON PROPOSALS

Doc No.	Title	Action
NFPA 32	Standard for Drycleaning Plants	C
NFPA 45	Standard on Fire Protection for Laboratories Using Chemicals	C
NFPA 70	National Electrical Code®	P
NFPA 91	Standard for Exhaust Systems for Air Conveying of Vapors, Gases, Mists, and Noncombustible Particulate Solids	C
NFPA 96	Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations	P
NFPA 120	Standard for Coal Preparation Plants	C
NFPA 121	Standard on Fire Protection for Self-Propelled and Mobile Surface Mining Equipment	W
NFPA 122	Standard for Fire Prevention and Control in Underground Metal and Nonmetal Mines	C
NFPA 123	Standard for Fire Prevention and Control in Underground Bituminous Coal Mines	W
NFPA 241	Standard for Safeguarding Construction, Alteration, and Demolition Operations	P
NFPA 271	Standard Method of Test for Heat and Visible Smoke Release Rates for Materials and Products Using an Oxygen Consumption Calorimeter.	P
NFPA 302	Fire Protection Standard for Pleasure and Commercial Motor Craft	P
NFPA 405	Recommended Practice for the Recurring Proficiency Training of Aircraft Rescue and Fire-Fighting Services	C
NFPA 408	Standard for Aircraft Hand Portable Fire Extinguishers	C
NFPA 409	Standard on Aircraft Hangars	P
NFPA 410	Standard on Aircraft Maintenance	C
NFPA 422	Guide for Aircraft Accident Response	C
NFPA 423	Standard for Construction and Protection of Aircraft Engine Test Facilities	C
NFPA 430	Code for the Storage of Liquid and Solid Oxidizers	P
NFPA 450	Guide for Emergency Medical Services and Systems	N
NFPA 502	Standard for Road Tunnels, Bridges, and Other Limited Access Highways	P

2004 MAY MEETING REPORT ON PROPOSALS—Continued

Doc No.	Title	Action
NFPA 555	Guide on Methods for Evaluating Potential for Room Flashover	C
NFPA 701	Standard Methods of Fire Tests for Flame Propagation of Textiles and Films	C
NFPA 780	Standard for the Installation of Lightning Protection Systems	C
NFPA 1150	Standard on Fire-Fighting Foam Chemicals for Class A Fuels in Rural, Suburban, and Vegetated Areas	C
NFPA 1201	Standard for Developing Fire Protection Services for the Public	C
NFPA 1250	Recommended Practice in Emergency Service Organization Risk Management	C
NFPA 1710	Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments.	P
NFPA 1720	Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations and Special Operations to the Public by Volunteer Fire Departments.	C
NFPA 1931	Standard on Design of and Design Verification Tests for Fire Department Ground Ladders	C
NFPA 1932	Standard on Use, Maintenance and Service Testing of Fire Department Ground Ladders	C

P = Partial revision; W = Withdrawal; R = Reconfirmation; N = New; C = Complete Revision.

Dated: July 9, 2003.

Arden L. Bement, Jr.,

Director.

[FR Doc. 03–18141 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

International Code Council: The Update Process for the International Codes and Standards

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The International Code Council (ICC), promulgator of the International Codes (''I-Codes'') and Standards, maintains a process for updating the entire family of International Codes based on receipt of proposals from interested individuals and organizations involved in the construction industry as well as the general public. The first edition of the I-Codes was the 2000 edition. The codes are updated every three years (2003 current edition, 2006 editions, etc.) with an intervening Supplement published every 18 months. There are two hearings for each code development cycle; the first hearing (Code Development Hearing) where a committee considers the proposals and recommends an action on each proposal, followed by the assembled members of ICC afforded the opportunity to vote; and the second hearing (Final Action Hearing) to consider comments submitted in response to the committee action on proposals. The schedule is printed below.

The purpose of this request is to increase public participation in the system used by ICC to develop and maintain its codes and standards. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of ICC is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the codes or standards referenced in the notice.

DATES: The 2003/2004 Code Development Cycle will start with the Code Development Hearings on September 5–14, 2003, at the Gaylord Opryland, Nashville, Tennessee. This will be followed by the Final Action Hearing tentatively scheduled for May 17–20, 2004, in Overland Park, Kansas.

Completion of this cycle results in the 2004 Supplement to the International Codes.

The agenda for the hearing as well as updates to the schedule are also posted on the ICC Web site at: *http://www.iccsafe.org.*

FOR FURTHER INFORMATION CONTACT: Mike Pfeiffer, PE, Vice President, Codes and Standards Development at ICC's Chicago Regional Office, 4051 West Flossmoor Road, Country Club Hills, Illinois 60478, Telephone 708/799–2300, Extension 338.

SUPPLEMENTARY INFORMATION:

Background

ICC produces the only family of Codes and Standards that are comprehensive, coordinated and necessary to regulate the built environment. Federal agencies frequently use these codes and standards as the basis for developing federal regulations concerning new and existing construction.

The Code Development Process is initiated when proposals from interested persons, supported by written data, views, or arguments are solicited and published in the Proposed Changes document. This document is distributed a minimum of 30 days in advance of the first hearing and serves as the agenda.

At the first hearing (Code Development Hearing), the ICC Code Development Committee considers testimony on every proposal and acts on each one individually (Approval, Disapproval, or Approval as Modified). The assembled body of all ICC members is then afforded the opportunity to vote on the proposal if they disagree with the Committee. The results are published in a report entitled the Report of the Public Hearing, which identifies the disposition of each proposal and the reason for the committee's action. Anyone wishing to submit a comment on the committee's action, expressing support or opposition to the action, is provided the opportunity to do so. Comments received are published and distributed in a document called the Final Action Agenda which serves as the agenda for the second hearing. Proposals which are approved by a vote of the Active Governmental Members of ICC at the second hearing (Final Action Hearing) are incorporated in either the Supplement or Edition, as applicable, with the next cycle starting with the submittal deadline for proposals.

Proponents of proposals automatically receive a copy of all documents (Proposed Changes, Report of the Public Hearing and Final Action Agenda). Interested parties may also request a copy, free of charge, from ICC's Chicago Regional Office at: International Code Council, Chicago Regional Office, 4051 W. Flossmoor Road, Country Club Hills, IL 60478–5795 or download a copy from the ICC Web site at *http://www.iccsafe.org.*

The International Codes and Standards consist of the following:

International Building Code
ICC Electrical Code
International Energy Conservation Code
International Existing Building Code
International Fire Code
International Fuel Gas Code
International Mechanical Code
ICC Performance Code for Buildings and Facilities
International Plumbing Code

International Private Sewage Disposal Code
International Property Maintenance Code
International Residential Code
International Urban-Wildland Interface Code
International Zoning Code
ICC/ANSI A 117.1 Accessible and Usable Buildings and Facilities
ICC Standard on Bleachers, Folding and Telescopic Seating, and Grandstands

ICC is currently in the process of developing two new standards, one on Storm Shelters and one on Hurricane Resistant Construction.

The maintenance process for ICC Standards follows a similar process of soliciting proposals, committee action, public comment, and ultimately the update and publication of the standard.

Dated: July 9, 2003.

Arden L. Bement, Jr.,

Director.

[FR Doc. 03–18142 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service, (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS or Sanctuary) is seeking applicants for the following six vacant seats on its Sanctuary Advisory Council (Council): Hawaii County, Honolulu County, Kauai County, Maui County, Education and Research. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the conservation and management of marine resources; and the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve two-year terms, pursuant to the Council's Charter.

DATES: Applications are due by August 1, 2003.

ADDRESSES: Application kits may be obtained on our Web site *http://hawaiihumpbackwhale.noaa.gov/* or from Amy Glester at the Hawaiian Islands Humpback Whale National Marine Sanctuary, 6700 Kalanianaole Hwy, Suite 104, Honolulu, Hawaii 96825. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Amy Glester at (808) 397–2655 or *amy.glester@noaa.gov.*

SUPPLEMENTARY INFORMATION: The HIHWNMS Advisory Council was established in March 1996 (the current Council has served since July 2001) to assure continued public participation in the management of the Sanctuary. Since its establishment, the Council has played a vital role in the decisions affecting the Sanctuary surrounding the main Hawaiian Islands.

The Council's twenty-four voting members represent a variety of local user groups, as well as the general public, plus ten local, state and federal governmental jurisdictions.

The Council is supported by three subcommittees: A Research Committee chaired by the Research Representative, an Education Committee chaired by the Education Representative, and a Conservation Committee chaired by the Conservation Representative, each respectively dealing with matters concerning research, education and resource protection.

The Council represents the coordination link between the Sanctuary and the state and federal government agencies, user groups, researchers, educators, policy makers, and other various groups that help to focus efforts and attention on the humpback whale and its habitat around the main Hawaiian Islands.

The Council functions in an advisory capacity to the Sanctuary Manager and is instrumental in helping to develop policies and program goals, and to identify education, outreach, research, long-term monitoring, resource protection and revenue enhancement priorities. The Council works in concert with the Sanctuary Manager by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Manager in achieving the goals of the Sanctuary program within the context of Hawaii's marine programs and policies.

Authority: 16 U.S.C. 1431 *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: July 8, 2003.

Jamison S. Hawkins,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 03–18144 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 071003G]

New England Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Monkfish Oversight Committee in August, 2003 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Friday, August 1, 2003, at 9:30 a.m.

ADDRESSES: The meeting will be held at the Sheraton Four Points Hotel, 407 Squire Road, Revere, MA 02151; telephone: (781) 284–7200.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will review the Plan Development Team's analyses of alternatives under consideration in the Amendment 2 Draft Environmental Impact Statement (DSEIS) and make recommendations on preferred alternatives to the New England and Mid-Atlantic Councils.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting dates.

Dated: July 14, 2003.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 03–18103 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 071003F]

Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council's (Council) Ad Hoc Groundfish Habitat Technical Review Committee will hold two working meetings, one by teleconference on August 4, 2003, and one in person on September 3–5, 2003. The meetings are open to the public.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates and times.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** for listening stations for the August 4th teleconference.

The September 3–5, 2003 meeting will take place at NOAA, NMFS, Northwest Regional Office, 7600 Sand Point Way, NE, Building 9, Seattle, WA 98115, Contact: Ms. Maryann Nickerson, telephone: 206–526–4490.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Ste. 200, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Dr. Christopher Dahl, NEPA Specialist; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The meetings are scheduled as follows:

August 4, 2003, 10:30 a.m. until 3:30 p.m

September 3, 2003, 1 p.m. until 6 p.m.

September 4, 2003, 8:30 a.m. until 6 p.m.

September 5, 2003, 8:30 a.m. until 3 p.m.

Listening stations for the August 4, 2003 teleconference will be available at the following addresses:

1. NOAA, NMFS, Northwest Region, Directors Conference Room, 7600 Sand Point Way NE, Bldg. 1, Seattle, WA 98115, Contact: Ms. Maryann Nickerson, telephone: 206–526–4490;

2. Pacific States Marine Fisheries Commission, Main Conference Room, 45 SE 82nd Drive, Ste. 100, Gladstone, OR 97027–2522, Contact: Ms. Teresa Fairchild, telephone: 503–650–5400;

3. Hatfield Marine Science Center, Guin Library, Barry Fisher Conference Room, 2030 SE Marine Science Drive, Newport, OR 97365–5296, Contact: Mr. Bruce McCain, telephone: 541–867–0523;

4. NMFS Southwest Fisheries Science Center, Santa Cruz Laboratory, Room 219 (Small Conference Room), 110 Shaffer Road, Santa Cruz, CA 95060, Contact: Ms. Mary Yoklavich, telephone: 831–420–3940.

The purpose of the Ad Hoc Groundfish Habitat Technical Review Committee meetings is to guide the ongoing assessment of essential fish habitat for Pacific Coast groundfish. On August 4, the committee will review certain elements of the assessment in order to provide technical feedback that may be implemented prior to the workshop in September. Opportunity for comment by non-committee members during the teleconference will be limited.

On September 3–5, the committee will meet in a working meeting in Seattle to consider the assessment in its entirety, including developments in the analytical framework and data consolidation. By holding a public meeting, the committee will provide opportunity for public participation in the assessment process. The committee will only consider technical and scientific questions related to the assessment and will not engage in policy discussions as part of its mission.

Although nonemergency issues not contained in the committee's agendas may come before the committee for discussion, those issues may not be the subject of formal action during these meetings. Committee action will be restricted to those issues specifically listed in this document and to any issues arising after publication of this document requiring emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the committee's intent to take final action to address the emergency.

Special Accommodations

The meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Maryann Nickerson; 206–526–4490 at least 7 days prior to the meeting date.

Dated: July 14, 2003.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 03–18102 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Informational Briefing on the kids.us Domain

AGENCY: National Telecommunications and Information Administration, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Commerce Department's National Telecommunications and Information Administration (NTIA) will host an informational briefing regarding the launch of the new kids.us domain.

DATES: Tuesday, July 22, 2003, at 3 p.m.

ADDRESSES: The meeting will take place at the Rayburn House Office Building, Independence Avenue, SW., Room 2123, Washington, DC 20515.

FOR FURTHER INFORMATION CONTACT: Kelly Klegar Levy, Associate Administrator, at (202) 482–1880 or *klevy@ntia.doc.gov.* All media inquiries should be directed to the Office of Public Affairs, NTIA, at (202) 482–7002.

SUPPLEMENTARY INFORMATION: The Dot Kids Implementation and Efficiency Act of 2002 (Pub. L. 107–317) was passed to create a safe space within the United States country code Internet domain for children under the age of 13. This kids.us space is dedicated to content that is suitable for minors and not harmful to minors. As part of the Act, Congress directed the NTIA to publicize the availability of the new domain. As part of the NTIA's efforts, this meeting will offer information about the domain; instructions about registering a kids.us address; content guidelines and restrictions; and an overview of the content review process. Presenters will include NeuStar, the company implementing and operating the kids.us domain space, and Cyveillance, the company providing content review.

Public Participation: The briefing will be open to the public and press on a first-come, first-served basis. Space is limited. The event is physically accessible to people with disabilities. Any member of the public wishing to

attend and requiring special services, such as sign language interpretation or other ancillary aids, should contact Kelly K. Levy, (202) 482–1880, at least two (2) days prior to the hearing.

Dated: July 14, 2003.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 03–18107 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–60–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Submission for OMB Emergency Review

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), submitted the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, (PRA 95) (44 U.S.C. Chapter 35). The Corporation requested that OMB review and approve its emergency request by July 17, 2003, for a period of six months. A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Corporation for National and Community Service, Office of Research and Policy Development, Mr. Robert Grimm, (202) 606–5000, Ext. 110 or by e-mail at *RGrimm@cns.gov.*

Unfortunately, since the Corporation requested OMB's approval of this emergency request by July 17, 2003, there will be not enough time for the public to provide comments through this **Federal Register** Notice before the approval date. Therefore, there will be no comment period for this request.

Type of Review: Emergency request.

Agency: Corporation for National and Community Service.

Title: Volunteer Management Capacity Survey.

OMB Number: None.

Agency Number: None.

Affected Public: Nonprofit organizations and congregations.

Total Respondents: 4,000.

Frequency: One time.

Average Time Per Response: Twenty-five (25) minutes.

Estimated Total Burden Hours: 1,667 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Description: During his 2002 State of the Union address, President Bush called upon Americans to dedicate at least two years over the course of their lives to the service of others. He created the USA Freedom Corps to promote this goal and to assist Americans in answering this ''Call to Service.'' The Corporation oversees AmeriCorps, Senior Corps, Learn and Serve America, and other programs that give Americans formal opportunities to serve their neighbors.

While the Corporation's programs provide one important way for Americans to connect to local nonprofit organizations and congregations that can benefit from volunteer service, hundreds of thousands of charities and congregations operate outside these programs, also meet critical community needs with volunteers, and sustain the American tradition of volunteering. For the President's Call to Service to succeed, however, American nonprofits and congregations, including Corporation grantees, will need to absorb and make better use of volunteers.

The Corporation has undertaken a research study that assesses the current volunteer management capacity of America's nonprofits and congregations. With this study, we will learn the effectiveness of current volunteer management practices and how we can enhance organizations' volunteer management infrastructure and use of volunteers (quality and quantity). Since September 11, 2001 and the President's Call to Service, many Americans have expressed a renewed desire to serve their country by volunteering in their community. Now, we have an obligation to ensure that Americans have quality opportunities to serve and the Volunteer Management Capacity Survey will give us invaluable information on how to help Americans do what the President has asked them to do. Therefore, the Corporation has requested OMB's emergency review and approval by July 17, 2003, so it can provide the White House with the completed study by November, 2003.

Dated: July 10, 2003.

David Reingold,

Director, Office of Research and Policy Development.

[FR Doc. 03–18063 Filed 7–16–03; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by August 18, 2003.

Title, Form, and OMB Number: Department of Defense Medical Examination Review Board Medical Information Collection Forms; DD Forms 2351, 2369, 2370, 2372, 2374, 2378, 2379, 2380, 2381, 2382, 2489, 2492, and 2632; OMB Number 0704–0396.

Type of Request: Extension.

Number of Respondents: 30,000.

Responses Per Respondent: 1.

Annual Responses: 30,000.

Average Burden Per Response: 60 minutes (average).

Annual Burden Hours: 11,000.

Needs and Uses: This information collection is necessary to determine the medical qualification of applicants to the five Service academies, the four-year Reserve Officer Training Corps College Scholarship Program, Uniform Services University of the Health Sciences, and the Army, Navy, and Air Force Scholarship and Non-Scholarship Programs. The collection of medical history of each applicant is to determine if applicants meet medical standards outlined in DoD Directive 6130.3, Physical Standards for Appointment, Enlistment and Induction, dated May 2, 1994. The completed forms are processed through medical reviewers representing their respective services to determine a medical qualification status. Associated forms may or may not be required depending on the medical information contained in the medical examination.

Affected Public: Individuals or Households.

Frequency: On Occasion.

Respondents's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Cristal A. Thomas.

Written comments and recommendations on the proposed information collection should be sent to Ms. Thomas at the Office of Management and Budget, Desk Officer for DoD Health Affairs, Room 10235,

New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: July 11, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–18094 Filed 7–16–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by August 18, 2003.

Title and OMB Number: Prospective Studies of U.S. Military Forces: The Millennium Cohort Study; OMB Number 0720—[To Be Determined].

Type of Request: New Collection.

Number of Respondents: 19,200.

Responses Per Respondent: 19,200.

Annual Responses: 30,000.

Average Burden Per Response: 45 minutes.

Annual Burden Hours: 14,400.

Needs and Uses: The purpose of the study is designed to systematically collect population-based demographic and health data to evaluate the health of service personnel throughout their military careers and after leaving military service. The principal objective of the study is to evaluate the impact of military deployments on various measures of health over time.

Affected Public: Individuals or Households.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Cristal A. Thomas.

Written comments and recommendations on the proposed information collection should be sent to Ms. Thomas at the Office of Management and Budget, Desk Officer, for DoD Health Affairs, Room 10235, New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: July 11, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–18105 Filed 7–16–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by August 18, 2003.

Title, Form, and OMB Number: Exceptional Family Member Program; DD Form 2792 and 2792–1; OMB Number 0704–0411.

Type of Request: Reinstatement.

Number of Respondents: 17,300.

Responses Per Respondent: 1.

Annual Responses: 17,300.

Average Burden Per Response: 27 minutes (average).

Annual Burden Hours: 7,785.

Needs and Uses: This information collection is necessary to screen Department of Defense military members to determine if they have special medical or educational conditions so that these conditions can be taken into consideration when being assigned to a new location. It is also used by DoD civilian employees who are considering a job overseas to assist them in deciding whether to relocate overseas with a family member who has special medical or educational needs. Respondents are private physicians and school personnel. The DD Form 2792, ''Exceptional Family Member Medical Summary,'' and DD Form 2792–1, ''Exceptional Family Member Education and Early Intervention Summary,'' are two forms used to gather the necessary information for this program.

Affected Public: Business or Other For-Profit, State, Local or Tribal Government.

Frequency: Triennial.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jacqueline A. Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for coipies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: July 11, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–18106 Filed 7–16–03; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

United States Marine Corps; Privacy Act of 1974; System of Records

AGENCY: United States Marine Corps, DoD.

ACTION: Notice to delete a records system.

SUMMARY: The U.S. Marine Corps is deleting one system of records notice from its inventory of records systems subject to the Privacy Act of 1974, as amended (5 U.S.C. 552a).

DATES: The deletion will be effective on (insert date thirty days after date published in the **Federal Register**) unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to Headquarters, U.S. Marine Corps, FOIA/PA Section (CMC–ARSE), 2 Navy Annex, Room 1005, Washington, DC 20380–1775.

FOR FURTHER INFORMATION CONTACT: Ms. Tracy D. Ross at (703) 614–4008.

SUPPLEMENTARY INFORMATION: The U.S. Marine Corps' records system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The U.S. Marine Corps proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The changes to the system of records are not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new

or altered systems reports. The records system being amended is set forth below, as amended, published in its entirety.

Dated: July 11, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

MFD00001

SYSTEM NAME:

Automated Leave and Pay System (ALPS) (February 22, 1993, 58 FR 10630).

Reason: These records are now under the cognizance of the Defense Finance and Accounting Service (DFAS), and are being maintained under the DFAS Privacy Act system of records notice T7335, Defense Civilian Pay System.

[FR Doc. 03–18058 Filed 7–16–03; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF ENERGY

Blue Ribbon Commission on the Use of Competitive Procedures for Department of Energy Laboratories; Notice of Open Meeting

AGENCY: Department of Energy.

SUMMARY: This notice announces an open meeting of the Secretary of Energy Advisory Board's subcommittee known as the Blue Ribbon Commission on the Use of Competitive Procedures for Department of Energy Laboratories. The Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770), requires that agencies publish these notices in the **Federal Register** to allow for public participation.

Name: Blue Ribbon Commission (BRC) on the Use of Competitive Procedures at Department of Energy Laboratories.

Dates and Times: Tuesday, August 5, 2003, 2 p.m.–4 p.m.

ADDRESSES: Ritz Carlton Hotel, Salon 2, Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Dr. Craig R. Reed, Executive Director, Secretary of Energy Advisory Board (AB–1), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7092 or (202) 586–6279 (fax).

SUPPLEMENTARY INFORMATION: The purpose of the Blue Ribbon Commission on the Use of Competitive Procedures at Department of Energy Laboratories (the Commission) is to provide the Secretary of Energy, through the Secretary of Energy Advisory Board, with essential independent advice and recommendations on issues related to the development of criteria to support future decisions regarding use of competition in renewing and extending the management and operations (M&O) contracts for the Department of Energy's national laboratories.

Tentative Agenda

The August 5 open meeting is intended to give the public an opportunity to provide input directly to the Blue Ribbon Commission members concerning the use of competition in awarding the M&O contracts for the Department of Energy's national laboratories. The Commission members are interested in obtaining input regarding the following questions:

- When is competition of a laboratory M&O contract appropriate?
- Should all contracts be competed, or if not, what criteria should be assessed in deciding to compete or extend a laboratory contract?
- Should a formal regimen for making competition decisions be established? Or is greater flexibility desirable?
- Should different decision criteria be developed according to the status of the M&O organization (for-profit, non-profit or educational institution) or the nature of the work or mission?
- What is the impact of competing a contract or changing the M&O contractor on the work performed at the laboratory?
- What should be the role of the ''contractor'' (industrial or university or not-for-profit) vs. the Lab Director and the DOE management (*e.g.*, regarding personnel, financial control, programs, security, *etc.*)? At what level in DOE management should oversight most appropriately reside?

Public Participation

In keeping with procedures, members of the public are invited to provide comments. The preference of the Commission is to have members of the public desiring to provide comments sign up, and to provide written comments addressing the questions listed above, in advance of the August 5 meeting. Members of the public who have submitted written statements addressing the questions outlined above will be given priority in speaking to the Commission. A time limit will be placed on those members of the public wishing to speak at the meeting, with time allocated in accordance with the number of people who have signed in and who have indicated a desire to speak to the Commission. The Chairman of the Commission is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business. Members of the public who have signed up in advance or who have submitted written comments will be heard first in the order in which their sign ups and/or statements were received. Others will be heard in the order in which they sign up at the beginning of the meeting. The Board will make every effort to hear the views of all interested parties. You may submit written comments to Dr. Craig R. Reed, Executive Director, Secretary of Energy Advisory Board, AB–1, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Written comments should be sent by Federal Express or facsimile transmission to 202–586–6279. All written submissions should be received by July 31, 2003. Please do not send written comments via the U.S. Postal Service.

Minutes

A copy of the minutes and a transcript of the meeting will be made available for public review and copying approximately 30 days following the meeting at the Freedom of Information Public Reading Room, 1E–190 Forrestal Building, 1000 Independence Avenue, SW., Washington, DC between 9 a.m. and 4 p.m., Monday through Friday except Federal holidays. Further information on the Secretary of Energy Advisory Board and its subcommittees may be found at the Board's Web site, located at *http://www.seab.energy.gov/*.

Issued at Washington, DC, on July 14, 2003.

James N. Solit,

Advisory Committee Management Officer.

[FR Doc. 03–18143 Filed 7–16–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–441–001]

ANR Pipeline Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, ANR Pipeline Company (ANR), 9 Greenway Plaza, Houston, Texas 77046, tendered for filing Substitute Eleventh Revised Sheet No. 149A for inclusion in ANR's FERC Gas Tariff, Second Revised Volume No. 1. ANR requests that the revised tariff sheet be made effective July 1, 2003.

ANR states that the tariff sheet is being filed in compliance with the Federal Energy Regulatory

Commission's June 24, 2003 order regarding ANR's Order No. 587–R compliance filing, requiring ANR to incorporate the Wholesale Gas Quadrant's Standards 1.4.4, 5.4.1, 5.4.3, 5.4.4, 5.4.7 and 5.4.9 by reference to Version 1.6.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18033 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–415–001]

ANR Storage Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, ANR Storage Company (ANR Storage), 9 Greenway Plaza, Houston, Texas 77046, tendered for filing Substitute Tenth Revised Sheet No. 153 for inclusion in ANR Storage's FERC Gas Tariff, Original Volume No. 1. ANR Storage requests that the revised tariff sheet be made effective July 1, 2003.

ANR Storage states that the tariff sheet is being filed in compliance with the Federal Energy Regulatory Commission's June 24, 2003 order regarding ANR Storage's Order No. 587–R compliance filing, which directed ANR Storage to incorporate the Wholesale Gas Quadrant's Standards 1.4.4, 5.4.1, 5.4.3, 5.4.4, 5.4.7 and 5.4.9 by reference to Version 1.6.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18030 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2069–007 Arizona]

Arizona Public Service Company; Notice to Teleconference

July 10, 2003.

a. *Date and Time of Teleconference:* July 25, 2003, at 1:00 p.m. EDT.

b. *FERC Contact:* Dianne Rodman at (202) 502–6077; *dianne.rodman@ferc.gov*

c. *Purpose of the Teleconference:* The Federal Energy Regulatory Commission intends to discuss with Arizona Public Service Company and other stakeholders comments on the Draft Environmental Assessment for the proposed surrender of the license for the Childs Irving Hydroelectric Project No. 2069 and any other relevant filings.

d. If you want to participate by teleconference, please contact Dianne Rodman at the number listed above no later than July 24, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18021 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–406–001]

Blue Lake Gas Storage Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Blue Lake Gas Storage Company (Blue Lake), 9 Greenway Plaza, Houston, Texas 77046, tendered for filing Substitute Tenth Revised Sheet No. 153 for inclusion in Blue Lake's FERC Gas Tariff, First Revised Volume No. 1. Blue Lake requests that the revised tariff sheet be made effective July 1, 2003.

Blue Lake states that the tariff sheet is being filed in compliance with the Federal Energy Regulatory Commission's June 24, 2003 order regarding Blue Lake's Order No. 587–R compliance filing, which directed Blue Lake to incorporate the Wholesale Gas Quadrant's Standards 1.4.4, 5.4.1, 5.4.3, 5.4.4, 5.4.7 and 5.4.9 by reference to Version 1.6.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18028 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–455–001]

Columbia Gas Transmission Corporation; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Columbia Gas Transmission Corporation (Columbia) filed the following revised tariff sheet to its FERC Gas Tariff, Second Revised Volume No. 1, bearing a proposed effective date of July 1, 2003:

Substitute Twelfth Revised Sheet No. 456

Columbia states that it made a filing with the Federal Energy Regulatory Commission (Commission) on May 1, 2003 in compliance with the Commission Order No. 587–R, Standards For Business Practices Of Interstate Natural Gas Pipelines, 102 FERC 61,273 (2003) issued on March 12, 2003, in Docket No. RM96–1–024. Columbia asserts that the Commission approved the filing on June 25, 2003, subject to modifications. Columbia states that the instant filing makes the modifications directed by the Commission in the June 25, 2003 Order.

Columbia states that copies of its filing are available for inspection at its offices at 12801 Fair Lakes Parkway, Fairfax, Virginia; 1700 MacCorkle Avenue, SE, Charleston, WV; and 10 G Street, NE., Suite 580, Washington, DC; and have been mailed to all firm customers, interruptible customers and affected state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18036 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–447–001]

Columbia Gulf Transmission Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Columbia Gulf Transmission Company (Columbia Gulf) filed the following revised tariff sheet to its FERC Gas Tariff, Second Revised Volume No. 1 (Tariff), bearing a proposed effective date of July 1, 2003:

Substitute Eighth Revised Sheet No. 286

Columbia Gulf states that it made a filing with the Federal Energy Regulatory Commission (Commission) on May 1, 2003 in compliance with the Commission Order No. 587–R, Standards For Business Practices Of Interstate Natural Gas Pipelines, 102 FERC 61,273 (2003) issued on March 12, 2003, in Docket No. RM96–1–024. Columbia Gulf asserts that the Commission approved the filing on June 25, 2003, subject to modifications. Columbia Gulf states that the instant filing makes the modifications directed by the Commission in the June 25, 2003 Order.

Columbia Gulf states that copies of its filing are available for inspection at its offices at 12801 Fair Lakes Parkway, Fairfax, Virginia; 1700 MacCorkle Avenue, SE, Charleston, WV; 2603 Augusta Drive, Houston, TX; and 10 G Street, NE., Suite 580, Washington, DC; and have been mailed to all firm customers, interruptible customers and affected state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18035 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL03–135–001]

Connecticut Light and Power Company; Notice of Initiation of Proceeding and Refund Effective Date

July 10, 2003.

Take notice that on July 8, 2003, the Commission issued an order initiating a proceeding under Section 206 of the Federal Power Act in Docket No. EL03–135–001 .

The refund effective date in Docket No. EL03–135–001 will be 60 days after publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18019 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–456–001]

Crossroads Pipeline Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Crossroads Pipeline Company (Crossroads) filed the following revised tariff sheets to its FERC Gas Tariff, First Revised Volume No. 1 (Tariff), bearing a proposed effective date of July 1, 2003:

Substitute Second Revised Sheet No. 380
Substitute Original Sheet No. 380A

Crossroads states that it made a filing with the Federal Energy Regulatory Commission (Commission) on May 1, 2003 in compliance with the Commission's Order No. 587–R, Standards For Business Practices Of Interstate Natural Gas Pipelines, 102 FERC 61,273 (2003) issued on March 12, 2003, in Docket No. RM96–1–024. Crossroads asserts that the Commission approved the filing on June 27, 2003, subject to modifications. Crossroads states that the instant filing makes the modifications directed by the Commission in the June 27, 2003 Order.

Crossroads states that copies of its filing are available for inspection at its offices at 12801 Fair Lakes Parkway, Fairfax, Virginia; 1700 MacCorkle Avenue, SE, Charleston, WV; and 10 G Street, NE., Suite 580, Washington, DC; and have been mailed to all firm customers, interruptible customers and affected state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18037 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–458–001]

Granite State Gas Transmission, Inc.; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Granite State Gas Transmission, Inc. (Granite State) filed the following revised tariff sheet to its FERC Gas Tariff, Third Revised Volume No. 1 (Tariff), bearing a proposed effective date of July 1, 2003:

Substitute Thirteenth Revised Sheet No. 289

Granite State states that it made a filing with the Federal Energy Regulatory Commission (Commission) on May 1, 2003 in compliance with the Commission Order No. 587-R, Standards For Business Practices Of Interstate Natural Gas Pipelines, 102 FERC 61,273 (2003) issued on March 12, 2003, in Docket No. RM96–1–024. Granite State asserts that the Commission approved the filing on June 25, 2003, subject to modifications. Granite State states that the instant filing makes the modifications directed by the Commission in the June 25, 2003 Order.

Granite State states that copies of its filing are available for inspection at its offices at 12801 Fair Lakes Parkway, Fairfax, Virginia; 1700 MacCorkle Avenue, SE, Charleston, WV; and 10 G Street, NE., Suite 580, Washington, DC; and have been mailed to all firm customers, interruptible customers and affected State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18038 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–368–001]

Great Lakes Gas Transmission Limited Partnership; Notice of Proposed Changes in FERC Gas Tariff

July 10, 2003.

Take notice that on July 7, 2003, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered for filing as part of its FERC Gas Tariff Second Revised Volume No. 1 the following tariff sheet, proposed to be effective July 1, 2003:

Substitute Ninth Revised Sheet No. 50C

Great Lakes states that this tariff sheet is being filed to comply with the Commission's Letter Order of June 25, 2003 in Docket No. RP03–368–000, wherein Great Lakes May 1, 2003 Order No. 587–R compliance filing was conditionally accepted pending filing of certain revised tariff sheets. Order No. 587–R adopted Version 1.6 of the standards promulgated by the Wholesale Gas Quadrant of the North American Energy Standards Board (NAESB).

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make

protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18025 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–336–001]

Gulfstream Natural Gas System, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

July 10, 2003.

Take notice that on July 7, 2003, Gulfstream Natural Gas System, L.L.C. (Gulfstream) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, reflecting effective dates of June 26, 2003, and July 1, 2003, respectively.

Original Sheet No. 8F
Original Sheet No. 8G

Gulfstream states that this filing is being made to implement two Park negotiated rate transactions under Rate Schedule PALS pursuant to Section 31 of the General Terms and Conditions (GT&C) of Gulfstream's FERC Gas Tariff. Gulfstream also states that the tariff sheets being filed herewith identify and describe the negotiated rate agreements, including the exact legal names of the relevant shippers, the negotiated rates, the rate schedules, the contract terms, and the Maximum Park Quantities. Gulfstream also states that the proposed tariff sheets include footnotes where necessary to provide further detail on the agreements listed thereon.

Gulfstream states that copies of its filing have been mailed to all affected customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Comment Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18024 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP00–474–004, RP01–17–007 and RP03–174–002]

Maritimes & Northeast Pipeline, L.L.C.; Notice of Supplemental Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, effective July 1, 2003:

Fourth Revised Sheet No. 1
Second Sub Original Sheet No. 10

Maritimes states that the purpose of this supplemental Order 637 filing is to comply with the Commission's June 9, 2003 ''Order on Rehearing and Compliance Filings'' issued in Maritimes'' Order No. 637 proceeding in the captioned dockets.

Maritimes states that copies of its filing have been mailed to all affected customers and interested state commissions, as well as to all parties on the Official Service Lists compiled by the Secretary of the Commission in these proceedings.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18022 Filed 7–16–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–471–001]

MIGC, Inc.; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, MIGC, Inc. (MIGC) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No.1, the following tariff sheets, to become effective July 1, 2003.

Sub Second Revised Sheet No. 49A
Sub Seventh Revised Sheet No. 52
Sub Fourth Revised Sheet No. 84
First Rev Fourth Revised Sheet No. 90A
First Revised Sheet No. 90B

MIGC asserts that the purpose of this filing is to comply with the Commission's Letter Order issued June 30, 2003, in Docket No. RP03–471–000, requiring MIGC to revise certain tariffs

which were originally filed in MIGC's Order No. 587–R compliance filing in RM96–1–024.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18039 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–414–001]

Northern Border Pipeline Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of Northern Border 's FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective July 1, 2003:

Substitute Fifth Revised Sheet No. 212
First Revised Sheet No. 268D.01a
Substitute Original Sheet No. 275B
Fifth Revised Sheet No. 299
Substitute Ninth Revised Sheet No. 300
Substitute Eighth Revised Sheet No. 300A
Substitute Third Revised Sheet No. 300F.01
Substitute Second Revised Sheet No. 300F.02
Substitute Fourth Revised Sheet No. 300F.06
Substitute Original Sheet No. 300F.07

Northern Border states that the purpose of this filing is to comply with the Commission's letter order in Docket No. RP03–414–000 that was posted to the FERC Web site on June 30, 2003.

Northern Border states that copies of this filing have been sent to all of Northern Border 's contracted shippers and interested state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18029 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 178–017]

Pacific Gas and Electric Company; Notice of Meeting

July 10, 2003.

a. Date and Time of Meeting: August 8, 2003 at 9 a.m.

b. Place: Rio Bravo River Rafting Parking Lot located on Rancheria Road approximately ¼ mile north of Highway 178, Bakersfield, California.

c. *FERC Contact:* Allison Arnold at (202) 502–6346; *allison.arnold@ferc.gov.*

d. *Applicant Contact:* Mr. Steve Nevares at (415) 973–3174.

e. Purpose of the Meeting: The Federal Energy Regulatory Commission will be conducting a site visit of the Kern Canyon Project (*Project No.:* 178–017).

f. Proposed Agenda:

1. Visit the Kern Canyon Project facilities
2. Discuss the concerns of all interested parties

g. All local, state, and Federal agencies, Indian Tribes, and interested parties, are hereby invited to attend this meeting as participants. If you wish to participate, please contact Allison Arnold at the number listed above no later than Thursday, July 31, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18020 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–446–001]

Portland Natural Gas Transmission System; Notice of Proposed Change in FERC Gas Tariff

July 10, 2003.

Take notice that on July 7, 2003, Portland Natural Gas Transmission System (PNGTS) tendered for filing the following revised tariff sheet to its FERC Gas Tariff, Original Volume No. 1, to become effective on July 1, 2003:

Substitute Fourth Revised Sheet No. 380

PNGTS states that its filing is submitted in compliance with the Commission's June 27, 2003 order in this proceeding, which accepted, subject to minor revisions, tariff sheets filed by PNGTS on May 1, 2003 in accordance with the Commission's Order No. 587–R. Order No. 587–R required pipelines to revise their tariffs to incorporate by reference Version 1.6 of the consensus standards promulgated by the North American Standards Board Wholesale Gas Quadrant (''WGQ'') and the WGQ standards for partial day recalls of capacity release transactions. PNGTS states that in accordance with the June 27, 2003 Order, PNGTS is correcting certain designations of the WGQ standards and recommendations that are being incorporated into the tariff and changing ''GISB'' references to ''WGQ Standards.''

PNGTS states that copies of this filing are being served on all jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the

Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Intervention Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18034 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–417–001]

Steuben Gas Storage Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Steuben Gas Storage Company (Steuben), 9 Greenway Plaza, Houston, Texas 77046, tendered for filing Substitute Tenth Revised Sheet No. 154 for inclusion in Steuben's FERC Gas Tariff, Original Volume No. 1. Steuben requests that the revised tariff sheet be made effective July 1, 2003.

Steuben states that the tariff sheet is being filed in compliance with the Federal Energy Regulatory Commission's June 24, 2003 order regarding Steuben's Order No. 587–R compliance filing, which directed Steuben to incorporate the Wholesale Gas Quadrant's Standards 1.4.4, 5.4.1, 5.4.3, 5.4.4, 5.4.7 and 5.4.9 by reference to Version 1.6.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18031 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP02–378–000 and RP02–378–001]

Texas Gas Transmission, LLC; Notice of Proposed Changes in FERC Gas Tariff

July 10, 2003.

Take notice that on July 2, 2003, Texas Gas Transmission, LLC, formerly Texas Gas Transmission Corporation (Texas Gas), requested that it be allowed to withdraw its web-based capacity auction proposal, as it has decided not to pursue that process at this time.

Texas Gas states that the tariff sheets listed below, which are currently pending Commission action, will not be moved into effect, but are instead withdrawn.

Docket No. RP02–378–000

Sixth Revised Sheet No. 146
Sheet No. 237
Original Sheet No. 239
Original Sheet No. 240
Original Sheet No. 241
Sheet No. 242

Docket No. RP02–378–001

First Revised Sheet No. 239
First Revised Sheet No. 240
First Revised Sheet No. 241
Sheet No. 395
Original Sheet No. 400
Original Sheet No. 401
Original Sheet No. 402
Original Sheet No. 403
Sheet No. 404

Texas Gas states that copies of this request are being mailed to all parties in this docket, to all parties on Texas Gas's official service list, to Texas Gas's jurisdictional customers, and to interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Comment Date: July 14, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18023 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–435–001]

Texas Gas Transmission, LLC formerly Texas Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 10, 2003).

Take notice that on July 7, 2003, Texas Gas Transmission, LLC (Texas Gas), formerly Texas Gas Transmission Corporation, tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the tariff sheets listed below to become effective July 1, 2003:

Second Revised Substitute Original Sheet No. 193A
Fourteenth Revised Sheet No. 207
Seventh Revised Sheet No. 207A

Texas Gas states that the tariff sheets filed herewith are being submitted in compliance with the Commission's June 27, 2003, Letter Order (103 FERC ¶ 61,360), which conditionally accepted Texas Gas's previously filed tariff sheets and directed Texas Gas to file revised tariff sheets within 10 days of that Order to address issues discussed within the Order itself.

Texas Gas states that copies of the tariff sheets are being mailed to all parties in this docket, to all parties on Texas Gas's official service list, to Texas Gas's jurisdictional customers and to interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For Assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Intervention Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18032 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–373–002]

Tuscarora Gas Transmission Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Tuscarora Gas Transmission Company (Tuscarora) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Substitute Seventh Revised Sheet No. 37A, to be effective July 1, 2003.

Tuscarora states that the purpose of this filing is to comply with the Commission's June 25, 2003 order on Tuscarora's initial Order No. 587–R compliance filing. The revised tariff sheet reflects Tuscarora's removal of Standard 4.3.4 from its list of standards incorporated by reference into its tariff.

Tuscarora states that copies of its filing have been mailed to all affected customers and interested state commissions, as well as to all parties on the Commission's official service list in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18026 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–387–002]

Viking Gas Transmission Company; Notice of Compliance Filing

July 10, 2003.

Take notice that on July 7, 2003, Viking Gas Transmission Company (Viking) tendered for filing to become part of Viking's FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheet to become effective July 1, 2003:

Substitute Fourteenth Revised Sheet No 87

Viking states that the purpose of this filing is to comply with the Commission's letter order in Docket No. RP03–387–000 that was posted to the FERC Web site on June 30, 2003.

Copies of this filing have been sent to all of Viking's contracted shippers and interested state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with § 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the

instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: July 21, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18027 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC03–46–000, et al.]

First Energy, et al.; Electric Rate and Corporate Filings

July 9, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. First Energy

[Docket No. AC03–46–000]

Take notice that on June 18, 2003, the Lake County, Ohio Auditor and the Lake County, Ohio Board of Revision (Auditor and Board of Revision) submitted a request for a ruling on the appropriate accounting for the reactor building complex at First Energy's Perry Plant. The Auditor and Board of Revision contend that the majority of the costs of the reactor building complex should have been classified to 18 CFR part 101, Account 321, Structures and Improvements, and not to 18 CFR part 101, Account 322, Reactor Plant Equipment. The Auditor and the Board of Revision explain that classification to the former account would result in the costs being taxed as real property by Lake County, while classification to the latter account would result in the costs being taxed as personal property by the State of Ohio.

Comment Date: July 31, 2003.

2. PDI Stoneman, Inc. Mid-American Power, LLC

[Docket No. EC03–100–000]

Take notice that PDI Stoneman, Inc. (PDI Stoneman) and Mid-American Power, LLC (Mid-American) (collectively, the Applicants), on June 30, 2003, submitted an application, pursuant to Section 203 of the Federal Power Act and part 33 of the Commission's regulations, requesting authorization for PDI Stoneman to complete its acquisition of Mid-American. Mid-American was initially owned by three other companies and is the owner of a single public utility facility, the EJ Stoneman Power Generation Station, a 53 MW generating plant located in Cassville, Wisconsin, which Mid-American acquired in 1996 from Dairyland Power Cooperative. Applicants request Commission action within the 60-day time period contemplated in Order No. 642 for applications that do not require competitive analysis.

PDI Stoneman states that copies of the filing were served on the Public Service Commissions of Wisconsin and Michigan where PDI Stoneman's regulated utility affiliates provide service.

Comment Date: July 21, 2003.

3. West Texas Utilities Company

[Docket No. EL00–79–000]

Take notice that on June 27, 2003, West Texas Utilities Company tendered for filing a refund report in compliance with the Commission's Order, dated December 16, 2001, in Mid-Tex G&T Electric Cooperative, Inc., et al. v. West Texas Utilities Company, 97 FERC ¶ 61,376.

Comment Date: July 28, 2003.

4. Southern California Edison Company

[Docket Nos. ER97–2355–010 and ER98–2322–005]

Take notice that on July 3, 2003, Southern California Edison Company (SCE) tendered for filing its refund report in compliance with Opinion Nos. 458 and 458–A.

SCE states that copies of this filing were served upon the official service list compiled for these dockets.

Comment Date: July 24, 2003.

5. California Independent System Operator Corporation

[Docket No. ER02–2489–002]

Take notice that on July 2, 2003, the California Independent System Operator Corporation (ISO) submitted a filing in compliance with the letter order issued by the Commission in Docket No. ER02–2489–001 on June 2, 2003. The ISO states it has served copies of this filing upon all entities that are on the official service list for the docket.

Comment Date: July 23, 2003.

6. Empire District Electric Company

[Docket No. ER03–626–002]

Take notice that on July 2, 2003, The Empire District Electric Company (Empire) submitted revisions to its FERC Electric Tariff, First Revised Volume No. 1, originally submitted on May 14, 2003, in order to comply with FERC Order No. 614. Empire states that copies of this filing were served on parties to this proceeding and on all affected state commissions.

Comment Date: July 23, 2003.

7. California Independent System Operator Corporation

[Docket No. ER03–746–001]

Take notice that on July 3, 2003, the California Independent System Operator Corporation (ISO) submitted a filing in compliance with the Commission's June 13, 2003 Order issued in Docket No. ER03–746–000, 103 FERC ¶ 61,331. The ISO states that copies of this filing were served upon all entities that are on the official service list for the docket.

Comment Date: July 24, 2003.

8. California Power Exchange Corporation

[Docket No. ER03–791–001]

Take notice that on July 2, 2003, the California Power Exchange Corporation made a filing to comply with the Commission's July 1, 2003 Order in Docket No. ER03–791–000, 104 FERC ¶ 61,005.

Comment Date: July 23, 2003.

9. American Electric Power Service Corporation

[Docket No. ER03–801–001]

Take notice that on July 3, 2003, American Electric Power Service Corporation (AEPSC) tendered for filing a tariff sheet canceling Ohio Power Company's FERC Electric Rate Schedule No. 71, in compliance with the Commission's Letter Order of June 6, 2003 in Docket ER03–801–000.

AEPSC requests an effective date of June 30, 2003 for the cancellation. AEPSC states that it has served copies of the filing upon The Ohio Edison Company, and upon the Public Utilities Commission of Ohio.

Comment Date: July 24, 2003.

10. American Electric Power Service Corporation

[Docket No. ER03–805–001]

Take notice that on July 3, 2003, American Electric Power Service Corporation (AEPSC) tendered for filing a tariff sheet canceling Ohio Power Company's FERC Electric Rate Schedule No. 70 and Columbus Southern Power Company's FERC Electric Rate Schedule No. 17, in compliance with the Commission's Letter Order of June 6, 2003 in Docket No. ER03–805–000.

AEPSC requests an effective date of June 30, 2003 for the cancellation. AEPSC states that it has served copies of the filing upon Buckeye Power, Inc., the Cincinnati Gas and Electric Company, the Dayton Power & Light Company, Monongahela Power Company and the Toledo Edison Company, and upon the Public Utilities Commission of Ohio.

Comment Date: July 24, 2003.

11. Westar Energy, Inc.

[Docket No. ER03–939–001]

Take notice that on July 2, 2003, Westar Energy, Inc. (Westar) submitted for filing Second Revised FPC No. 72, Electric Interconnection Contract between Westar and Western Light & Telephone Company, Inc., now known as Aquila Networks-WPK (Aquila). With this filing, Westar states that it is withdrawing and substituting its earlier filing of June 10, 2003 in Docket No. ER03–939–000.

Westar states that a copy of this filing was served upon the Kansas Corporation Commission and Aquila.

Comment Date: July 23, 2003.

12. CERITAS Energy, LLC

[Docket No. ER03–963–001]

Take notice that on July 3, 2003, CERITAS Energy, LLC (CERITAS Energy) filed an amendment to its June 17, 2003 petition for acceptance of Rate Schedule FERC No. 1, the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations. CERITAS Energy states that the amended Petition revises Rate Schedule FERC No. 1 to conform with Commission Order No. 614 regarding designation of electric rate schedule sheets.

Comment Date: July 24, 2003.

13. Pine Bluff Energy LLC

[Docket No. ER03–1015–000]

Take notice that on July 1, 2003, Pine Bluff Energy LLC, tendered for filing, under Section 205 of the Federal Power Act, a rate schedule for reactive power from the Pine Bluff Energy Center.

Comment Date: July 22, 2003.

14. PPM Two LLC

[Docket No. ER03–1017–000]

Take notice that on July 2, 2003, PPM Two LLC, tendered for filing a Notice of Cancellation of Rate Schedule FERC No. 1 and related Statement of Policy and Code of Conduct.

Comment Date: July 23, 2003.

15. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER03–1018–000]

Take notice that on July 2, 2003, the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) submitted for filing proposed revisions to Schedule 10 of the Midwest ISO Open Access Transmission Tariff (OATT), FERC Electric Tariff, Second Revised Volume No. 1.

The Midwest ISO has requested waiver of the service requirements set for in 18 CFR 385.2010. The Midwest ISO states that it has electronically served a copy of this filing, with attachments, to all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, Policy Subcommittee participants, as well as all state commissions within the region. In addition, Midwest ISO also states that the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filing to FERC'' for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

Comment Date: July 23, 2003.

16. Portland General Electric Company

[Docket No. ER03–1019–000]

Take notice that on July 2, 2003, Portland General Electric Company (PGE) tendered for filing Revised Tariff Sheets to the Second Revised Volume No. 8 of PGE's FERC Electric Tariff. PGE states that the revisions are intended to broaden the application of Energy Imbalance Service Schedule 4 pursuant to PGE's Open Access Transmission Tariff (OATT).

PGE requests a waiver of the Commission's 60-day notice requirement and an effective date of June 1, 2003. PGE states that a copy of the filing was served upon the Oregon Public Utility Commission.

Comment Date: July 23, 2003.

17. PacifiCorp

[Docket No.ER03–1020–000]

Take notice that on July 2, 2003, PacifiCorp tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations a Notice of Cancellation of PacifiCorp's Rate Schedule No. 267 with Sierra Pacific Power Company effective April 30, 2000.

PacifiCorp states that copies of this filing were supplied to Sierra Pacific Power Company and the Public Utility Commission of Oregon.

Comment Date: July 23, 2003.

18. Ameren Services Company

[Docket No. ER03–1021–000]

Take notice that on July 2, 2002, Ameren Services Company (ASC) tendered for filing an unexecuted Service Agreement for Firm Point-to-Point Service between ASC and American Electric Power Service Corp., as agent for the AEP Operating Co. ASC asserts that the purpose of the Agreement is to permit ASC to provide transmission service to American Electric Power Service Corp., as agent for the AEP Operating Co. pursuant to Ameren's Open Access Transmission Tariff.

Comment Date: July 23, 2003.

19. New York State Electric & Gas Corporation

[Docket No. ER03–1022–000]

Take notice that on July 2, 2003, New York State Electric & Gas Corporation (NYSEG) tendered for filing pursuant to Section 205 of the Federal Power Act and Section 35.13 of the Commission Regulations, an amendment to Rate Schedule 200 a Facilities Agreement with the New York Power Authority (NYPA).

NYSEG requests an effective date of September 1, 2003. NYSEG states that copies of the filing have been served upon the New York Power Authority and Public Service Commission of the State of New York.

Comment Date: July 23, 2003.

20. American Electric Power Service Corporation

[Docket No.ER03–1023–000]

Take notice that on July 2, 2003, the American Electric Power Service Corporation (AEPSC) tendered for filing pursuant to Section 35.15 of the Federal Energy Regulatory Commission's regulations, 18 CFR Section 35.15 a Notice of Termination of an executed Facilities Agreement between Indian Michigan Power Company and Indeck-Niles, L.L.C. designated as Service Agreement No. 4238 under American Electric Power Operating Companies' Open Access Transmission Tariff.

AEP requests an effective date of July 1, 2003. AEP states that a copy of the filing was served upon Indeck-Niles, L.L.C. and the Public Service Commission of Indiana and Michigan.

Comment Date: July 23, 2003.

21. American Electric Power Service Corporation

[Docket No.ER03–1023–000]

Take notice that on July 2, 2003, the American Electric Power Service Corporation (AEPSC) tendered for filing pursuant to Section 35.15 of the Federal Energy Regulatory Commission's regulations, 18 CFR Section 35.15 a Notice of Termination of an executed Facilities Agreement between Indian Michigan Power Company and Indeck-Niles, L.L.C. designated as Service Agreement No. 4238 under American Electric Power Operating Companies' Open Access Transmission Tariff.

AEP requests an effective date of July 1, 2003. AEP states that a copy of the filing was served upon Indeck-Niles,

L.L.C. and the Public Service Commission of Indiana and Michigan.

Comment Date: July 23, 2003.

22. Westar Energy, Inc.

[Docket No. ER03–1024–000

Take notice that on July 2, 2003, Westar Energy, Inc. (Westar) submitted for filing changes to the Electric Service Agreement between Westar Energy, Inc. and the City of St. John, Kansas. Westar states that the changes allow the City of St. John to meet its electric energy requirements through use of its own generation and/or the purchase of outside resources from third parties generating from renewable resources. Additionally, Westar states that the changes will allow St. John to purchase energy under Westar's Market Rate Tariff and extend the term of service an additional two years. Westar also states that these changes meet the conditions of a Stipulation and Agreement reached in FERC Docket No. EC03–23.

Westar states that a copy of this filing was served upon the Kansas Corporation Commission and the City of St. John.

Comment Date: July 23, 2003.

23. FPL Energy Wyoming, LLC

[Docket No. ER03–1025–000]

Take notice that on July 2, 2003, FPL Energy Wyoming, LLC tendered for filing an application for authorization to sell energy and capacity at market-based rates pursuant to section 205 of the Federal Power Act.

Comment Date: July 23, 2003.

24. Portland General Electric Company

[Docket No. ER03–1027–000]

Take notice that on July 3, 2003, Portland General Electric Company (PGE) submitted for filing on executed Service Agreement entered into between PGE and Powerex Corp. (Powerex) under PGE's Open Access Transmission Tariff (OATT).

PGE seeks waiver of the Commission's notice requirements to permit an effective date of June 1,2003 for the Service Agreement. PGE states that copies of the filing were served upon Powerex and the Oregon Public Utility Commission.

Comment Date: July 24, 2003.

25. Midwest Energy, Inc

[Docket Nos. ER03–1028–000, ER03–1029–000ER03–1030–000, ER03–1031–000, ER03–1032–000, ER03–1033–000 and ER03–1034–000]

Take notice that on July 3, 2003, Midwest Energy, Inc. (Midwest) submitted for filing the following:

Rate Schedule No. 21 between Midwest and the City of Ellinwood, Kansas
Rate Schedule No. 23 between Midwest and the City of Stafford, Kansas
Rate Schedule No. 20 between Midwest and the City of Larned, Kansas
Rate Schedule No. 17, Amendment No. 3 between Westar Energy, Inc. and Central Kansas Power Company, Inc., now know as Midwest
Rate Schedule No. 22 between Midwest and the City of Sterling, Kansas
Rate Schedule No. 18, Amendment No. 2 between Midwest and Centel Corporation, now known as Aquila Networks-WPK
Rate Schedule No. 21 between Midwest and the City of Ellinwood, Kansas

Midwest states that these submittals are required to comply with and implement the transfer by sale of certain transmission and distribution facilities by Westar Energy, Inc. (Westar) to Midwest as set forth in the Stipulation and Agreement entered into by and between Westar, Midwest, and the Kansas Municipal Energy Agency (KMEA) and filed with the Commission on June 13, 2003, in Docket No. EC03–23–000. Midwest states that a copy of this filing was served upon the Kansas Corporation Commission and the KEMA and Aquila.

Comment Date: July 24, 2003.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov* , using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866)208–3676, or for TTY, contact (202)502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. 03–18047 Filed 7–16–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10024]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (CMS)), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Revision of a currently approved collection; *Title of Information Collection:* Medicare Health Survey (MHS) and Data Collection for Administering the PACE Health Survey to Beneficiaries Enrolled in PACE and the Dual Eligible Demonstrations; *Form No.:* CMS–10024 (OMB# 0938–0844); *Use:* The Centers for Medicare & Medicaid Services has developed a survey, the PHS, that is similar to the Health Outcomes Survey (HOS). This survey was approved for PACE and the Wisconsin Partnership Program (WPP) on March 14, 2003. OMB also approved the use of the PHS to beneficiaries enrolled in Minnesota Senior Health Options and Minnesota Disability Health Options (MSHO/MnDHO) on June 3, 2003 for a 6-month period. This

PRA submission combines OMB approval for PACE, WPP 0938–0844 with OMB approval for MSHO/MnDHO 0938–0899 and requests to administer the PHS to beneficiaries enrolled in MassHealth SCO as well as administer the PHS in year 2005. The main purpose of the PHS is to collect health status information that may be used to adjust Medicare payment to MSHO/MnDHO health plan organizations. It has been successfully pilot-tested to assess response rates and accuracy of responses under different distribution approaches. The pilot test enabled CMS to select an approach whereby PACE and Dual Eligible Demonstration enrollees will be sent surveys to fill out and can request assistance from family or professionals; *Frequency:* Annually; *Affected Public:* Individuals or Households and Not-for-profit institutions; *Number of Respondents:* 15,859; *Total Annual Responses:* 10,785; *Total Annual Hours:* 1,798.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site address at *http://cms.hhs.gov/regulations/pra/default.asp,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the CMS Paperwork Clearance Officer designated at the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances, Attention: Dawn Willinghan, Room: C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: July 10, 2003.

Dawn Willinghan,

CMS Reports Clearance Officer, Division of Regulations Development and Issuances, Office of Strategic Operations and Strategic Affairs.

[FR Doc. 03–18059 Filed 7–16–03; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–588, CMS–1514, CMS–368/R–144]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (CMS)), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently Approved collection; *Title of Information Collection:* Authorization agreement for electronic forms transfer; *Form No.:* CMS–0588 (OMB# 0938–0626); *Use:* The information is needed to allow providers to receive funds electronically in their bank accounts; *Frequency:* On occasion; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 10,000; *Total Annual Responses:* 10,000; *Total Annual Hours:* 1,250.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Hospital Request for Certification in the Medicare/Medicaid Program; *Form No.:* CMS–1514 (OMB# 0938–0380); *Use:* Section 1861 of the Social Security Act requires hospitals and critical access hospitals to be certified to participate in the Medicare/Medicaid program. These providers must complete the ''Hospital Request for Certification in the Medicare/Medicaid Program'' form in order to be certified or recertified; *Frequency: Annually; Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 6,300; *Total Annual Responses:* 2,000; *Total Annual Hours:* 500.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Drug Rebate; *Form No.:* 0938–0582; *Use:* Section 1927 requires State Medicaid agencies to report to drug manufacturers and CMS on the drug utilization for their State and the amount of rebate to be paid by the manufacturer; *Frequency:* Quarterly; *Affected Public:* State, local, or tribal government; *Number of Respondents:* 51; *Total Annual Responses:* 204; *Total Annual Hours:* 6,125.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site address at *http://cms.hhs.gov/regulations/pra/default.asp,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *paperwork@hcfa.gov,* or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Brenda Aguilar, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: July 10, 2003.

Dawn Willinghan,

Acting Paperwork Reduction Act Team Leader, CMS Reports Clearance Officer, Office of Strategic Operations and Strategic Affairs, Division of Regulations Development and Issuances.

[FR Doc. 03–18060 Filed 7–16–03; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 03D–0195]

Guidance for Industry on Necessity of the Use of Food Product Categories in Registration of Food Facilities; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Necessity of the Use of Food Product Categories in Registration of Food Facilities.'' FDA has developed this guidance in response to section 305(a) of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), which states that FDA may require registrants to submit the general food categories of food manufactured, processed, packed, or held at the facility, if FDA determines ''through guidance'' that such information is necessary. This guidance contains FDA's finding that information about food categories is necessary for a quick, accurate, and focused response to an actual or potential bioterrorist incident or other food-related emergency.

DATES: This guidance is final upon the date of publication. However, you may submit written or electronic comments at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Regulations and Policy (HFS–24), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the guidance may be sent.

Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments on the guidance to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Melissa S. Scales, Center for Food Safety and Applied Nutrition (HFS-24), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2378.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance entitled ''Necessity of the Use of Food Product Categories in Registration of Food Facilities.'' FDA is issuing this guidance as a followup to the publication of its proposed regulation to implement the Bioterrorism Act's requirement that domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States must register with FDA by December 12, 2003. (See 68 FR 5378, February 3, 2003.) The final rule, which FDA plans to publish in the Federal Register by October 10, 2003, will implement section 305 of the Bioterrorism Act. Section 305 of the Bioterrorism Act requires domestic and foreign facilities to register with FDA by December 12, 2003, even in the absence of final regulations. Section 305 of the Bioterrorism Act also states that FDA may require registrants to submit the general food categories (as identified in § 170.3 (21 CFR 170.3)) of food manufactured, processed, packed, or held at the facility, if FDA determines through guidance that such information is necessary. This guidance contains FDA's finding that inclusion of food product categories in a facility's registration is necessary for a quick, accurate, and focused response to an actual or potential bioterrorist incident or other food-related emergency.

FDA believes that information about a facility's food product categories is a key element to allow for rapid communications between FDA and facilities directly affected by an actual or potential bioterrorist attack or other food-related emergency. Information about the categories of food a facility handles will assist FDA in conducting investigations and surveillance operations in response to a food-related emergency. These categories will also enable FDA to quickly alert facilities potentially affected by such an incident if FDA receives information indicating the type of food affected. For example, if FDA receives information indicating that soft drinks could be affected by a bioterrorist incident or other food-related emergency, FDA would be able to alert soft drink manufacturers/processors,[1] packers, and holders about the incident. Additionally, the food categories in conjunction with the prior notification requirements that have been proposed for 21 CFR part 1, subpart I (68 FR 5428, February 3, 2003), would aid FDA in verifying that imported products are correctly identified by where and when they were produced. For example, if the registration information identifies a facility as producing only dairy products and FDA receives a prior notice for a shipment of nuts purporting to have been produced at that facility, FDA can inspect the shipment for verification based on the discrepancy. FDA, therefore, proposed in § 1.232(e) of the proposed rule to include the food product categories listed in § 170.3 as a mandatory field on the registration form. (See 68 FR 5378 at 5419, February 3, 2003.) Since § 170.3 does not list all the categories of food that are manufactured/processed, packed, or held for consumption in the United States, FDA proposed to include additional food categories as an optional field on the registration form.

This guidance represents FDA's finding on the need for food product category information as part of the registration of food facilities under the Bioterrorism Act. Section 305 of the Bioterrorism Act directs FDA to require information about the food categories listed in § 170.3, if the agency determines ''through guidance'' that such information is a necessary component of registration. Because of Congress's explicit statutory authorization to establish a binding requirement based on a finding in guidance, this document is not subject to the usual restrictions in FDA's good guidance practice (GGP) regulations, such as the requirements that guidances not establish legally enforceable responsibilities and that they prominently display a statement of the document's nonbinding effect. (See § 10.115(d) and (i) (21 CFR 10.115(d) and (i)).)

To comply with the GGP regulations and make sure that regulated entities and the public understand that guidance documents are nonbinding, FDA guidances ordinarily contain standard language explaining that guidances should be viewed only as recommendations unless specific regulatory or statutory requirements are cited, and the agency's guidances also ordinarily include the following standard paragraph:

This guidance represents the Food and Drug Administration's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach, contact the FDA staff responsible for implementing this guidance. If you cannot identify the appropriate FDA staff, call the appropriate number listed on the title page of this guidance.

Although this guidance has no binding effect, it contains a finding that serves as the predicate for a binding regulation that would impose a new requirement on industry. If the previsions of the proposed rule (68 FR 5378) regarding food categories are finalized as proposed, the final rule would require registrants to indicate in their registration which of the food

[1] In the proposed rule, FDA noted that the meanings of the terms ''manufacture'' and ''process'' overlap and proposed to define both activities together as ''manufacturing/processing.'' (See 68 FR 5378 at 5382, February 3, 2003.)

categories listed in § 170.3 they manufacture/process, pack, or hold. In that event, facilities would be unable to use an alternative approach to including those food categories in registration because no alternative approach would satisfy the requirements of the applicable statute and regulations. Therefore, FDA is not including the standard guidance paragraph in the guidance because it does not apply.

FDA is issuing this guidance document as a level 1 guidance. Consistent with FDA's GGP regulation, the agency will accept comment, but is implementing the guidance document immediately in accordance with § 10.115(g)(2), because the agency has determined that prior public participation is not feasible or appropriate. FDA is under a strict statutory deadline in which to complete the final rule associated with this guidance. Moreover, the public has already had an opportunity to comment on the necessity of food product categories in the proposed rule.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the guidance document. Submit a single paper copy of electronic comments to *http://www.fda.gov/dockets/ecomments* or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

An electronic version of this guidance is available on the Internet at *http://www.cfsan.fda.gov/guidance.html*.

Dated: July 7, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–18087 Filed 7–16–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506 (c) (2) (A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: HRSA AIDS Education and Training Centers Evaluation Activities—NEW

The AIDS Education and Training Centers (AETC) Program, under the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act, supports a network of regional and cross-cutting national centers that conduct targeted, multi-disciplinary education and training programs for health care providers treating persons with HIV/AIDS. The AETCs' purpose is to increase the number of health care providers who are effectively educated and motivated to counsel, diagnose, treat, and medically manage individuals with HIV infection, and to help prevent high risk behaviors that lead to HIV transmission.

As part of a national evaluation effort of AETC activities, one questionnaire and several record-keeping forms have been developed to capture information on AETC activities. The first form is the Participant Information Form and asks trainees for information on the individual's profession, type of clinical practice, and patient population. Recordkeeping forms include (1) The Program Record which records information such as topic, training time, number of people reached, and format per training activity, (2) the Clinical Consultation Form which collects information on consults with a provider regarding a specific patient, (3) the Group Clinical Consultation Form records information on the nature of the cases discussed and the session format during a site visit, and (4) the Agency Technical Assistance Form which collects information on activities to improve non-clinical aspects of care (*e.g.*, medical records, resource allocation). The information on the recordkeeping forms comprises a core data set that will be submitted to the HIV/AIDS Bureau (HAB) data contractor three times per year.

Each center will be required to report aggregate data from these forms on their activities to HRSA/HAB. This data collection will provide information on the number of training, consultation, and technical assistance activities by center, the number of health care providers receiving professional training or consultation, the time and effort expended on different types of training and consultation activities, the populations served by the AETC trainees, and the increase in capacity achieved through training and technical assistance activities. Collection of this information will allow HRSA/HAB to provide information on training activities, types of education and training provided to Ryan White CARE Act grantees, resource allocation, and capacity expansion.

Trainees will be asked to complete the Participant Information Form for each activity they complete. The estimated annual response burden to attendees of training programs is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Participant Information	75,000	2	150,000	0.2	30,000

The estimated annual burden to AETCs is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Program Record	12	500	6,000	0.1	600
Clinical Consultation	12	300	3,600	0.1	360
Group Clinical Consultation	12	75	900	0.1	90
Technical Assistance	12	250	3,000	0.1	300
Aggregate Data Set	12	3	36	32	1,152
Total	12		13,536		2,502

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14–45, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 9, 2003.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 03–18057 Filed 7–16–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Office for Women's Services; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of a teleconference meeting of the Advisory Committee for Women's Services of the Substance Abuse and Mental Health Services Administration (SAMHSA) in July 2003.

The meeting of the Advisory Committee for Women's Services will include discussion around co-occuring disorders, Access to Recovery, Collaboration with the Health Resources and Services Administration and SAMHSA on Women s Activities and other substance abuse and mental health issues affecting women.

A summary of the meeting and/or a roster of committee members may be obtained from: Nancy P. Brady, Executive Secretary, Advisory Committee for Women's Services, Office for Women's Services, SAMHSA, Parklawn Building, Room 12C–26, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–1135.

Attendance by the public will be limited to space available. Public comments are welcome. Please communicate with the individual listed as contact below to make arrangements to comment or to request special accommodations for persons with disabilities.

Substantive information may be obtained from the contact whose name and telephone number is listed below.

Committee Name: Advisory Committee for Women's Services.

Meeting Date/Time: Open: July 25, 2003, 12 p.m.–2 p.m.

Place: 5600 Fishers Lane, Room 10–105, Rockville, MD 20857.

Contact: Nancy P. Brady, Executive Secretary, 5600 Fishers Lane, Parklawn Building, Room 12C–26, Rockville, MD 20857.

Telephone: (301) 443–1135; Fax: (301) 594–6159 and e-mail: *nbrady@samhsa.gov.*

This notice is being published less than 15 days prior to the conference call meeting due to the immediate need to discuss planning for the face to face meeting in September.

Dated: July 11, 2003.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 03–18089 Filed 7–16–03; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2003–15566]

Navigation Safety Advisory Council

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The Navigation Safety Advisory Council (NAVSAC) will meet to discuss various issues relating to the safety of navigation. The meetings are open to the public.

DATES: NAVSAC will meet on Monday and Tuesday, August 11 and 12, 2003, from 8:30 a.m. to 5 p.m., and on Wednesday, August 13, 2003, from 8 a.m. to 12 noon. The meeting may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before August 7, 2003. Requests to have material distributed to each member of the Council prior to the meeting should reach the Executive Director of NAVSAC along with 25 copies of the material on or before August 1, 2003.

ADDRESSES: NAVSAC will meet at the Maritime Institute of Technology (MITAGS), 5700 Hammonds Ferry Road, Linthicum Heights, MD 20190, in Room 8 North located in Building 1. Parking is available in Lots A and B. Send written material and requests to make oral presentations to Margie G. Hegy, Commandant (G–MW), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001. This notice is available on the Internet in docket number USCG–2003–15566 at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Margie G. Hegy, Executive Director of NAVSAC, telephone 202–267–0415, fax 202–267–4700.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Meeting

The agenda includes the following:

(1) Maritime security update and member information exchange.

(2) Update on the Marine Transportation System (MTS) Initiative.

(3) Overview/update on Automatic Identification System (AIS) technology and implementation.

(4) Places of refuge.

(5) Status report on ballast water issues.

(6) Interaction between commercial and recreational vessels.

(7) Update on International Maritime Organization (IMO) issues and U.S. positions on issues.

(8) IMO Amendment to International Navigation Rule 8.

Procedural

All meetings are open to the public. Please note that the meeting may close early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meetings. If you would like to make an oral presentation, please notify the Executive Director no later than August 7, 2003. Written material for distribution at a meeting should reach the Coast Guard no later than August 7, 2003. If you would like a copy of your material distributed to each member of the Council in advance of the meeting, please submit 25 copies to the Executive Director no later than August 1, 2003.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meetings, contact the Executive Director as soon as possible.

Dated: July 9, 2003.

T.H. Gilmour,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Environmental Protection.

[FR Doc. 03–18118 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of an Agency Draft Recovery Plan for the Endangered Fat Threeridge (*Amblema neislerii*), Shinyrayed Pocketbook (*Lampsilis subangulata*), Gulf Moccasinshell (*Medionidus penicillatus*), Ochlockonee Moccasinshell (*Medionidus simpsonianus*), and Oval Pigtoe (*Pleurobema pyriforme*), and the Threatened Chipola Slabshell (*Elliptio chipolaensis*) and Purple Bankclimber (*Elliptoideus sloatianus*), for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability and public comment period.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of the agency draft recovery plan for seven freshwater mussels—the endangered fat threeridge (*Amblema neislerii*), shinyrayed pocketbook (*Lampsilis subangulata*), Gulf moccasinshell (*Medionidus penicillatus*), Ochlockonee moccasinshell (*Medionidus simpsonianus*), and oval pigtoe (*Pleurobema pyriforme*), and the threatened Chipola slabshell (*Elliptio chipolaensis*) and purple bankclimber (*Elliptoideus sloatianus*). These species are endemic to several river basins (Apalachicola-Chattahoochee-Flint, Ochlockonee, Suwannee, and Econfina Creek) in Alabama, Florida, and Georgia. Recent research has greatly increased our understanding of the ecology of these species. The agency draft recovery plan includes specific recovery objectives and criteria to be met in order to downlist these mussels to threatened status or delist them under the Endangered Species Act of 1973, (16 U.S.C. 1531 *et seq.*) as amended (Act). We solicit review and comment on this agency draft recovery plan from local, State, and Federal agencies and the public.

DATES: In order to be considered, we must receive comments on the draft recovery plan on or before August 18, 2003.

ADDRESSES: If you wish to review this agency draft recovery plan, you may obtain a copy by contacting the Panama City Field Office, U.S. Fish and Wildlife Service, 1601 Balboa Avenue, Panama City, Florida 32405 (telephone 850/769–0552), or by visiting our recovery plan Web site at *http://www.endangered.fws.gov.* If you wish to comment, you may submit your comments by any one of several methods:

1. You may submit written comments and materials to the Project Leader, at the above address.

2. You may hand-deliver written comments to our Panama City Field Office, at the above address, or fax your comments to 850/763–2177.

3. You may send comments by e-mail to *jerry_ziewitz@fws.gov.* For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section.

Comments and materials received are available on request for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Jerry Ziewitz at the above address (telephone 850/769–0552, ext. 223).

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the Act, we listed these seven mussels, five as endangered and two as threatened species, on March 16, 1998 (63 FR 12664). The seven freshwater mussels are restricted to a few river basins (Apalachicola-Chattahoochee-Flint, Ochlockonee, Suwannee, and Econfina Creek) in Alabama, Florida, and Georgia. They were once distributed across hundreds of stream miles in these basins and now survive in a few relatively small, isolated populations scattered throughout their former range.

Habitat alteration, including impoundments, channelization, gravel mining, contaminants, sedimentation, and stream-flow depletion, are likely the principal causes of these species' decline in range and abundance. Genetic factors associated with increasingly small and isolated populations and the introduction of alien species may present additional obstacles to their recovery.

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the endangered species program. To help guide the recovery effort, we are preparing recovery plans for most listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting, and estimate time and cost for implementing recovery measures.

The Act requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide a public notice and an opportunity for public review and comment during recovery plan development. We will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. We and other Federal agencies will take these comments into account in the course of implementing approved recovery plans.

We developed a technical/agency draft of this recovery plan and released it for review by the professional community, interested agencies, and the public on September 16, 1999 (64 FR 50301). We incorporated received comments, where appropriate, into this subsequent agency draft recovery plan, which we are now making available for review by all interested agencies and parties, including the general public.

The objective of this draft plan is to provide a framework for the recovery of these seven species so that protection under the Act is no longer necessary. As recovery criteria are met, the status of the species will be reviewed and they will be considered for removal from the Federal List of Endangered and Threatened Wildlife and Plants.

Public Comments Solicited

We solicit written comments on the recovery plan described. We will consider all comments received by the date specified above prior to final approval of the plan.

Please submit electronic comments as an ASCII file format and avoid the use of special characters and encryption. Please also include your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Panama City Field Office (*see* **ADDRESSES** section).

Our practice is to make all comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. In some circumstances, we would withhold also from the record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: July 3, 2003.

J. Mitch King,

Acting Regional Director, Southeast Region, U.S. Fish and Wildlife Service.

[FR Doc. 03–18081 Filed 7–16–03; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice of Proposed Intent To Reduce Minimum Bid Requirements and Set Sliding-Scale Rentals for Proposed Beaufort Sea Outer Continental Shelf (OCS) Oil and Gas Lease Sale 186

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of proposed intent to reduce minimum bid levels and set sliding-scale rentals for OCS sale 186.

SUMMARY: On February 20, 2003, the MMS published a Notice of Availability (68 FR 8306) of the proposed Notice of Sale for Sale 186, which included lease terms and conditions providing for a minimum bid amount of $62 per hectare and a rental rate of $13 per hectare, consistent with past OCS sales in the Alaska Region. After further consideration, the MMS has tentatively determined that the minimum bid levels for Sale 186 should be reduced and rentals set on a sliding scale. The MMS is announcing this proposed action at this time to give potential bidders and other interested parties ample time to consider these changes in preparing for the lease sale. This proposed change in the financial terms and conditions of the proposed sale does not affect minimum royalty requirements, royalty suspension volumes, size, timing, location, or potential impacts of the sale. The final Notice of Sale will establish all terms and conditions for Sale 186 and will be issued at least 30 days before the sale is held. Anyone wishing to comment should send comments by August 1, 2003 to the Alaska OCS Region, 949 East 36th Avenue, 3rd Floor, Anchorage, Alaska 99508–4302.

DATES: Beaufort Sea OCS Lease Sale 186 is scheduled for September 24, 2003.

ADDRESSES: The proposed Notice of Sale and associated documents are available at: Alaska OCS Region, Information Resource Center, Minerals Management Service, 949 East 36th Avenue, Room 330, Anchorage, Alaska 99508–4302, Telephone: (907) 271–6438 or 1–800–764–2627.

SUPPLEMENTARY INFORMATION: The MMS proposes to apply the minimum bid amounts and rental rates in the table presented below for Sale 186. Refer to the February 2003 proposed Notice of Sale for descriptions of Zones A and B.

TABLE OF MINIMUM BIDS AND RENTAL RATES

Terms (values per hectare)	Zone A	Zone B
Minimum Bid	$37.50	$25.00
Rental Rates:		
Year 1	$7.50	$2.50
Year 2	7.50	3.75
Year 3	7.50	5.00
Year 4	7.50	6.25
Year 5	7.50	7.50
Year 6	12.00	10.00
Year 7	17.00	12.00
Year 8	22.00	15.00
Year 9	30.00	17.00
Year 10	30.00	20.00

The new bidding requirements outlined above are designed in part to provide potential bidders the incentive to acquire sufficient acreage to support a timely seismic data acquisition program. The revised sliding-scale rental terms are intended to encourage expeditious exploration of domestic energy resources. In Zone A, which we believe holds the most promise for near term development and production of oil resources, the minimum bid and rentals are set slightly above those for Zone B. We set the terms in Zone B similar to those used by the State of Alaska for some leases in the northern portion of the state as well as to the terms used by the Bureau of Land Management for the leasing of less prospective acreage in the National Petroleum Reserve—Alaska. Hence, the revised terms presented here will allow the Federal offshore lease offering to be comparable to other sales in this area. We have determined that these new proposed terms will not increase the level or range of oil and gas development activities contemplated and addressed in the Final Environmental Impact Statement or the Coastal Zone Management Act consistency determination.

The MMS is required to assure that fair market value is received for all OCS lands leased and rights conveyed. Although we are proposing to change the minimum bid and rental requirements, all bids received in Sale 186 will undergo an extensive evaluation to determine if they represent fair market value. Thus, regardless of the minimum bid level, the high bid received for any block must satisfy the bid adequacy criteria established by the MMS for a lease to be awarded. Note that this change in terms is intended to apply only to Sale 186 and does not necessarily represent a general policy change for future Alaska or other OCS lease sales. In accordance with the 5-Year OCS Oil and Gas Leasing Program for 2002–2007, minimum bids and rental rates are considered on a sale-by-sale basis.

Johnnie Burton,

Director, Minerals Management Service.

[FR Doc. 03–18139 Filed 7–16–03; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice of Availability of the Proposed Notice of Sale for Outer Continental Shelf (OCS) Oil and Gas Lease Sale 189 in the Eastern Gulf of Mexico (GOM)

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of availability of the proposed notice of sale for proposed sale 189.

SUMMARY: The MMS announces the availability of the proposed Notice of Sale for proposed Sale 189 in the Eastern GOM OCS. This Notice is published pursuant to 30 CFR 256.29(c) as a matter of information to the public. With regard to oil and gas leasing on the OCS, the Secretary of the Interior, pursuant to section 19 of the OCS Lands Act, provides the affected States the opportunity to review the proposed Notice. The proposed Notice sets forth the proposed terms and conditions of the sale, including minimum bids, royalty rates, and rentals.

DATES: Comments on the size, timing, or location of proposed Sale 189 are due from the affected States within 60 days following their receipt of the proposed Notice. The final Notice of Sale will be published in the **Federal Register** at least 30 days prior to the date of bid opening. Bid opening is currently scheduled for December 10, 2003.

SUPPLEMENTARY INFORMATION: The proposed Notice of Sale for Sale 189 and a ''Proposed Sale Notice Package'' containing information essential to potential bidders may be obtained from the Public Information Unit, Gulf of Mexico Region, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394. Telephone: (504) 736–2519.

Dated: June 26, 2003.

R.M. ''Johnnie'' Burton,

Director, Minerals Management Service.

[FR Doc. 03–18138 Filed 7–16–03; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS) Western Gulf of Mexico (GOM) Oil and Gas Lease Sale 187

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final notice of sale 187.

SUMMARY: On August 20, 2003, MMS will open and publicly announce bids received for blocks offered in Western GOM Oil and Gas Lease Sale 187, pursuant to the OCS Lands Act (43 U.S.C. 1331–1356, as amended) and the regulations issued thereunder (30 CFR part 256).

The Final Notice of Sale 187 Package (FNOS 187 Package) contains information essential to bidders, and bidders are charged with the knowledge of the documents contained in the Package.

DATES: Public bid reading will begin at 9 a.m., Wednesday, August 20, 2003, in Grand Ballroom C (5th floor) at the Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, Louisiana. All times referred to in this document are local New Orleans times, unless otherwise specified.

ADDRESSES: Bidders can obtain a FNOS 187 Package containing this Notice of Sale and several supporting and essential documents referenced herein from the MMS Gulf of Mexico Region Public Information Unit, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, (504) 736–2519 or (800) 200–GULF.

Filing of Bids: Bidders must submit sealed bids to the Regional Director (RD), MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, between 8 a.m. and 4 p.m. on normal working days, and from 8 a.m. to the Bid Submission Deadline of 10 a.m. on Tuesday, August 19, 2003. If bids are mailed, please address the envelop containing all of the sealed bids as follows:

Attention: Mr. John L. Rodi, MMS Gulf of Mexico Region, Contains Sealed Bids for Sale 187.

If the RD receives bids later than the time and date specified above, he will return those bids unopened to bidders. Bidders may not modify or withdraw their bids unless the RD receives a written modification or written withdrawal request prior to 10 a.m. on Tuesday, August 19, 2003. Should an unexpected event such as flooding or travel restrictions be sisgnificantly disruptive to bid submission, the MMS Gulf of Mexico Region may extend the Bid Submission Deadline. Bidders may call (504) 736–0557 for information about the possible extension of the Bid Submission Deadline due to such an event.

Areas Offererd for Leasing: The MMS is offering for leasing all blocks and partial blocks listed in the document ''Blocks Available for Leasing in Western GOM Oil and Gas Lease Sale 187'' included in thee FNOS 187 Package. All of these blocks are shown on the following Leasing Maps and Official Protraction Diagrams (which may be purchased from the MMS Gulf of Mexico Region Publicc Information Unit):

Outer Continental Shelf Leasing Maps—Texas Map Numbers 1 through 8

(These 16 maps sell for $2.00 each)

TX1 South Padre Island Area (revised November 1, 2000)
TX1A South Padre Island Area, East Addition (revised November 1, 2000)
TX2 North Padre Island Area (revised November 1, 2000)
TX2A North Padre Island Area, East Addition (revised November 1, 2000)
TX3 Mustang Island Area (revised November 1, 2000)
TX3A Mustang Island Area, East Addition (revised September 3, 2002)
TX4 Matagorda Island Area (revised November 1, 2000)
TX5 Brazos Area (revised November 1, 2000)
TX5B Brazos Area, South Addition (revised November 1, 2000)
TX6 Galveston Area (revised November 1, 2000)
TX6A Galveston Area, South Addition (revised November 1, 2000)
TX7 High Island Area (revised November 1, 2000)
TX7A High Island Area, East Addition (revised November 1, 2000)
TX7B High Island Area, South Addition (revised November 1, 2000)
TX7C High Island Area, East Addition, South Extension (revised November 1, 2000)
TX8 Sabine Pass Area (revised November 1, 2000)

Outer Continental Shelf Official Protraction Diagrams

(These 7 diagrams sell for $2.00 each)

NG14–03 Corpus Christi (revised November 1, 2000)
NG14–06 Port Isabel (revised November 1, 2000)
NG15–01 East Breaks (revised November 1, 2000)
NG15–02 Garden Banks (revised November 1, 2000)
NG15–04 Alaminos Canyon (revised November 1, 2000)
NG15–05 Keathley Canyon (revised November 1, 2000)
NG15–08 Sigsbee Escarpment (revised November 1, 2000)

Please Note: A CD–ROM (in ARC/INFO and Acrobat (.pdf) format) containing all of the GOM Leasing Maps and Official Protraction Diagrams, except for those not yet converted to digital format, is available from the MMS Gulf of Mexico Region Public Information Unit for a price of $15.00. For the current status of all Western GOM Leasing Maps and Official Protraction Diagrams, please refer to 66 FR 28002 (published May 21, 2001) and 67 FR 60701 (published September 26, 2002). In addition, Supplemental Official OCS Block Diagrams (SOBDs) for these blocks are available for blocks which contain the ''U.S. 200 Nautical Mile Limit'' line and the ''U.S.-Mexico Maritime Boundary'' line. These SOBDs are also available from the MMS Gulf of Mexico Region Public Information Unit. For

additional information, please call Mr. Charles Hill (504) 736–2795.

All blocks are shown on these Leasing Maps and Official Protraction Diagrams. The available Federal acreage of all whole and partial blocks in this sale is shown in the document ''List of Blocks Available for Leasing in Sale 187'' included in the FNOS 187 Package. Some of these blocks may be partially leased or deferred, or transected by administrative lines such as the Federal/State jurisdictional line, or partially included in the Flower Garden Banks National Marine Sanctuary (in accordance with the President's June 1998 withdrawal directive, portions of blocks lying within National Marine Sanctuaries are no longer available for leasing). Information on the unleased portions of such blocks is also found in the document ''Western Gulf of Mexico Lease Sale 187—Unleased Split Blocks and Available Unleased Acreage of Blocks with Aliquots and Irregular Portions Under Lease or Deferred,'' included in the FNOS 187 Package.

Areas Not Available for Leasing: The following whole and partial blocks are not offered for lease in this sale:

Currently unleased whole blocks and portions of blocks which lie within the boundaries of the Flower Garden Banks National Marine Sanctuary at the East and West Flower Garden Banks and Stetson Bank (the following list includes all blocks affected by the Sanctuary boundaries):

High Island, East Addition, South Extension (Area TX7C)

Whole Blocks: A–375, A–398.

Portions of Blocks: A–366, A–367, A–374, A–383, A–384, A–385, A–388, A–389, A–397, A–399, A–401.

High Island, South Addition (Area TX7B)

Portions of Blocks: A–502, A–513.

Garden Banks (Area NG15–02)

Portions of Blocks: 134, 135.

Blocks located off Corpus Christi which have been identified by the Navy as needed for testing equipment and training mine warfare personnel:

Mustang Island (Area TX3)

Whole Blocks: 793, 799, 816.

Whole blocks and portions of blocks which lie within the 1.4 nautical mile buffer zone north of the continental shelf boundary between the United States and Mexico:

Keathley Canyon (Area NG15–05)

Portions of Blocks: 978 through 980.

Sigsbee Escarpment (Area NG15–08)

Whole Blocks: 11, 57, 103, 148, 149, 194, 239, 284, 331 through 341.

Portions of Blocks: 12 through 14, 58 through 60, 104 through 106, 150, 151, 195, 196, 240, 241, 285 through 298, 342 through 349.

Whole blocks and portions of blocks deferred from this sale are shown on the map ''Stipulations and Deferred Blocks, Sale 187, Final.''

Statutes and Regulations: Each lease issued in this sale is subject to the OCS Lands Act of August 7, 1953, 67 Stat. 462; 43 U.S.C. 1331 et seq., as amended (92 Stat. 629), hereinafter called ''the Act''; all regulations issued pursuant to the Act and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the OCS and the protection of correlative rights therein; and all other applicable statutes and regulations.

Lease Terms and Conditions: Initial period, extensions of initial period, minimum bonus bid amount, rental rates, royalty rates, minimum royalty, and royalty suspension areas are shown on the map ''Lease Terms and Economic Conditions, Sale 187, Final'' for leases resulting from this sale:

Initial Period: 5 years for blocks in water depths of less than 400 meters; 8 years for blocks in water depths of 400 to 799 meters; and 10 years for blocks in water depths of 800 meters or deeper;

Extensions of Initial Period: Extensions *may* be granted for eligible leases on blocks in water depths less than 400 meters as specified in Notice To Lessees and Operators 2000–G22, effective December 22, 2000;

Minimum Bonus Bid Amount: A bonus bid amount of $25 per acre or fraction thereof for blocks in water depths of less than 800 meters and a bonus bid amount of $37.50 per acre or fraction thereof for blocks in water depths of 800 meters or deeper;

Rental Rates: $5 per acre or fraction thereof for blocks in water depths of less than 200 meters and $7.50 per acre or fraction thereof for blocks in water depths of 200 meters or deeper, to be paid on or before the first day of each lease year until a discovery in paying quantities of oil or gas, then at the expiration of each lease year until the start of royalty-bearing production;

Royalty Rates: 16 ⅔ percent royalty rate for blocks in water depths of less than 400 meters and a 12 ½ percent royalty rate for blocks in water depths of 400 meters or deeper, except during periods of royalty suspension, to be paid monthly on the last day of the month next following the month during which the production is obtained;

Minimum Royalty: After the start of royalty-bearing production: $5 per acre or fraction thereof per year for blocks in water depths of less than 200 meters and $7.50 per acre or fraction thereof per year for blocks in water depths of 200 meters or deeper, to be paid at the expiration of each lease year with credit applied for actual royalty paid during the lease year. If actual royalty paid exceeds the minimum royalty requirement, then no minimum royalty payment is due;

Royalty Suspension Areas: Royalty suspension, subject to gas price thresholds, will apply to blocks in water depths less than 200 meters where new deep gas (15,000 feet or greater subsea) is drilled and commences production within 5 years from lease issuance, and, subject to both oil and gas price thresholds, will apply in water depths of 400 meters or deeper; see the map ''Lease Terms and Economic Conditions, Sale 187, Final'' for specific areas and the ''Royalty Suspension provisions, Sale 187, Final'' document contained in the FNOS 187 Package for specific details regarding royalty suspension eligibility, applicable price thresholds and implementation.

Stipulations: The map ''Stipulations and Deferred Blocks, Sale 187, Final'' depicts the blocks on which one or more of five lease stipulations apply: (1) Topographic Features; (2) Military Areas; (3) Operations in the Naval Mine Warfare Area; (4) Law of the Sea Convention Royalty Payment; and (5) Protected Species. The texts of the stipulations are contained in the document ''Lease Stipulations for Oil and Gas Lease Sale 187, Final'' included in the FNOS 187 Package.

Information to Lessees: The FNOS 187 package contains and ''Information To Lessees'' document which provides detailed information on certain specific issues pertaining to this oil and gas lease sale.

Method of Bidding: For each block bid upon, a bidder must submit a separate signed bid in a sealed envelope labeled ''Sealed Bid for Oil and Gas Lease Sale 187, not to be opened until 9 a.m., Wednesday, August 20, 2003.'' The total amount of the bid must be in a whole dollar amount; any cent amount above the whole dollar will be ignored by the MMS. Details of the information required on the bid(s) and the bid envelope(s) are specified in the document ''Bid Form and Envelope'' contained in the FNOS 187 Package.

The MMS published a list of restricted joint bidders, which applies to

this sale, in the **Federal Register** at 68 FR 81 on April 28, 2003. Bidders must execute all documents in conformance with signatory authorizations on file in the MMS Gulf of Mexico Region Adjudication Unit. Partnerships also must submit or have on file a list of signatories authorized to bind the partnership. Bidders submitting joint bids must include on the bid form the proportionate interest of each participating bidder, in percentage using a maximum of five decimal places, *e.g.,* 33.33333 percent. The MMS may require bidders to submit other documents in accordance with 30 CFR 256.46. The MMS warns bidders against violation of 18 U.S.C. 1860 prohibiting unlawful combination or intimidation of bidders. Bidders are advised that the MMS considers the signed bid to be a legally binding obligation on the part of the bidder(s) to comply with all applicable regulations, including payment of the one-fifth bonus bid amount on all high bids. A statement to this effect must be included on each bid (see the document ''Bid Form and Envelope'' contained in the FNOS 187 Package).

Rounding: The following procedure must be used to calculate the minimum bonus bid, annual rental, and minimum royalty on blocks with fractional acreage: Round up to the next whole acre and multiply by the applicable dollar amount per acre to determine the correct minimum bonus bid, annual rental, or minimum royalty.

Please Note: For the minimum bonus bid only, if the calculation results in a decimal figure, round up to the next whole dollar amount (see next paragraph). The minimum bonus bid calculation, including all rounding, is shown in the document ''List of Blocks Available for Leasing in Sale 187'' including in the FNOS 187 Package.

Bonus Bid Deposit: Each bidder submitting an apparent high bid must submit a bonus bid deposit to the MMS equal to one-fifth of the bonus bid amount for each such bid. Under the authority granted by 30 CFR 256.46(b), the MMS *requires* bidders to use electronic funds transfer procedures for payment of one-fifth bonus bid deposits for Sale 187, following the detailed instructions contained in the document ''Instructions for Making EFT Bonus Payments'' included in the FNOS 187 Package. All payments must be electronically deposited into an interest-bearing account in the U.S. Treasury (account specified in the EFT instructions) by 1 p.m. Eastern Time the day following bid reading. Such a deposit does not constitute and shall not be construed as acceptance of any bid on behalf of the United States. If a lease is awarded, however, MMS requests that only one transaction be used for payment of the four-fifths bonus bid amount and the first year's rental.

Please Note: Certain bid submitters (*i.e.,* those that do NOT currently own or operate an OCS mineral lease OR those that have ever defaulted on a one-fifth bonus bid payment (EFT or otherwise)) are required to guarantee (secure) their one-fifth bonus bid payment *prior* to the submission of bids. For those who must secure the EFT one-fifth bonus bid payment, one of the following options may be used: (1) Provide a third-party guarantee; (2) Amend Development Bond Coverage; (3) Provide a Letter or Credit; or (4) Provide a lump sum payment in advance via EFT. The EFT instructions specify the requirements for each option.

Withdrawal of Blocks: The United States reserves the right to withdraw any block from this sale prior to issuance of a written acceptance of a bid for the block.

Acceptance, Rejection or Return of Bids: The United States reserves the right to reject any and all bids. In any case, no bid will be accepted, and no lease for any block will be awarded to any bidder, unless the bidder has complied with all requirements of this Notice, including the documents contained in the associated FNOS 187 Package and applicable regulations; the bid is the highest valid bid; and the amount of the bid has been determined to be adequate by the authorized officer. The Attorney General may also review the results of the lease sale prior to the acceptance of bids and issuance of leases. Any bid submitted which does not conform to the requirements of this Notice, the OCS Lands Act, as amended, and other applicable regulations may be returned to the person submitting that bid by the RD and not considered for acceptance. To ensure that the Government receives a fair return for the conveyance of lease rights for this sale, high bids will be evaluated in accordance with MSS bid adequacy procedures. A copy of the current procedures, ''Modifications to the Bid Adequacy Procedures'' (64 FR 37560 of July 12, 1999), can be obtained from the MMS Gulf of Mexico Region Public Information Unit via the Internet.

Successful Bidders: As required by the MMS, each company that has been awarded a lease must execute all copies of the lease (Form MMS–2005 (March 1986) as amended), pay by EFT the balance of the bonus bid amount and the first year's rental for each lease issued in accordance with the requirements of 30 CFR 218.155, and satisfy the bonding requirements of 30 CFR 256, Subpart I, as amended. Each bidder in a successful high bid must have on file in the MMS Gulf of Mexico Region Adjudication Unit a currently valid certification (Debarment Certification Form) certifying that the bidder is not excluded from participation in primary covered transactions under Federal nonprocurement programs and activities. A certification previously provided to that office remains currently valid until new or revised information applicable to that certification becomes available. In the event of new or revised applicable information, the MMS will require a subsequent certification before lease issuance can occur.

Persons submitting such certifications should review the requirements of 43 CFR, Part 12, Subpart D. A copy of the Debarment Certification Form is contained in the FNOS 187 Package.

Affirmative Action: The MMS *requests* that, prior to bidding, Equal Opportunity Affirmative Action Representation Form MMS 2032 (June 1985) and Equal Opportunity Compliance Report Certification Form MMS 2033 (June 1985) be on file in the Gulf of Mexico Region Adjudication Unit. This certification is required by 41 CFR 60 and Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967. In any event, prior to the execution of any lease contract, both forms are *required* to be on file in the MMS Gulf of Mexico Region Adjudication Unit.

Geophysical Data and Information Statement: Pursuant to 30 CFR 251.12, the MMS has a right to access geophysical data and information collected under a permit in the OCS. Each bidder submitting a bid on a block in Sale 187, or participating as a joint bidder in such a bid, must submit a Geophysical Data and Information Statement identifying any processed or reprocessed pre- and post-stack depth migrated geophysical data and information in its possession or control and used in the evaluation of that block. The existence, extent (*i.e.,* number of line miles for 2D or number of blocks for 3D) and type of such data and information must be clearly identified. The statement must include the name and phone number of a contact person, and an alternate, knowledgeable about the depth data sets (that were processed or reprocessed to correct for depth) used in evaluating the block. In the event such data and information includes data sets from different timeframes, you should identify only the most recent data set used for block evaluations. The statement must also identify each block upon which a bidder participated in a bid but for which it does not possess or

control such depth data and information.

Each bidder must submit a separate Geophysical Data and Information Statement in a sealed envelope. The envelope should be labeled ''Geophysical Data and Information Statement for Oil and Gas Lease Sale 187'' and the bidder's name and qualification number must be clearly identified on the outside of the envelope. This statement must be submitted to the MMS at the Gulf of Mexico Regional Office, Attention: Resource Evaluation (1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394) by 10 a.m. on Tuesday, August 19, 2003. The statement may be submitted in conjunction with the bids or separately. Do not include this statement in the same envelope containing a bid. These statements will not be opened until after the public bid reading at Lease Sale 187 and will be kept confidential. An Example of Preferred Format for the Geophysical Data and Information Statement is included in the FNOS 187 Package.

Please refer to NTL No. 2003–G05 for more detail concerning submission of the Geophysical Data and Information Statement, making the data available to the MMS following the lease sale, preferred format, reimbursement for costs, and confidentiality.

Dated: July 2, 2003.

R.M. ''Johnnie'' Burton,

Director, Minerals Management Service.

[FR Doc. 03–18140 Filed 7–16–03; 8:45 am]

BILLING CODE 4310–MR–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on July 1, 2003, a proposed Consent Decree in *United States, et al.* v. *Billabong II ANS,* Civil No. 2:03–2157–18, was lodged with the United States District Court for the District of South Carolina, Charleston Division.

In this action the United States and the State of South Carolina sought natural resource damages for injuries to natural resources arising from a spill of fuel oil from the Motor Vessel STAR EVVIVA into the Atlantic Ocean off of the coast of South Carolina on or about January 14, 1999. The defendant is Billabong II ANS, the owner of the Motor Vessel STAR EVVIVA.

Under the terms of the proposed settlement, the Settlor will pay $95,207 to the United states and $28,847 to the State of South Carolina as reimbursement for damage assessment costs and will pay $1,875,946 into an account established within the Department of the Interior's Natural Resource Damage Assessment and Restoration Account. The funds paid into the Restoration Account will be held in that account to pay costs to be incurred by the United States and the State of South Carolina for restoring, rehabilitating, replacing, or acquiring the equivalent of the natural resources injured by the spill.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication, comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *Billabong II ANS,* D.J. Ref. 90–5–1–1–07114.

The Consent Decree may be examined at the Office of the United States Attorney, Joseph P. Griffith, Jr., Assistant U.S. Attorney, PO Box 978, 151 Meeting Street, Suite 200, Charleston, SC 29402. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 616–6584, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $4.50 (18 pages at 25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen Mahan,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–18050 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on July 2, 2003, a proposed Consent Decree in *United States* v. *Eagle Construction Inc.,* Civil Action No. 03–620, was lodged with the United States District Court for the District of Delaware.

In this action the United States sought recovery under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9607, of response costs incurred by the United States with respect to the release of hazardous substances at the East 7th Street Drum Site in Wilmington, New Castle County, Delaware. The Consent Decree requires Settling Defendant Eagle Construction to pay $10,000 to the United States, based on Eagle's limited ability to pay. In addition, Eagle agrees to take steps to sell the parcel of land that comprises the Site and to pay to the United States the net proceeds of such sale.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Eagle Construction, Inc.,* D.J. Ref. No. 90–11–3–07185/1.

The Consent Decree may be examined at the Office of the United States Attorney, District of Delaware, Chase Manhattan Centre, 1201 Market Street, Suite 1100, Wilmington, DE 19801, and at U.S. Environmental Protection Agency Region III, 1650 Arch Street, Philadelphia, PA 19103. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $8.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert D. Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–18051 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended

Notice is hereby given that a proposed Consent Decree in the action entitled *United States* v. *Hathaway-Braley Wharf Co.,* Civil Action No. 03 CV 11259WGY (D. Mass.), was lodged on July 2, 2003, with the United States District Court for the District of Massachusetts. The proposed Consent Decree resolves claims of the United States, under Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9606 and 9607(a), against Hathaway-Braley Wharf Company, Inc. (''Hathaway-Braley'') in connection with the Atlas Tack Corporation Superfund Site (''Site'') located in Fairhaven, Massachusetts. The Consent Decree will also resolve claims of the Commonwealth of Massachusetts (''Commonwealth'') in connection with the Site under section 107(a) of CERCLA and section 5(a) of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E.

Under the proposed Consent Decree, Hathaway-Braley will make a payment of $501,575 to the United States to reimburse the United States for its past and future response costs incurred in connection with the Site and $51,125 to the Commonwealth to reimburse the Commonwealth for its past and future response costs incurred in connection with the Site. In addition, Hathaway-Braley has agreed to record an Environmental Restriction and Easement (''ERE'') with respect to the two parcels of property, totaling about 6.2 acres (the ''Property''), owned by Hathaway-Braley at the Site. The ERE will impose certain restrictions on the use of a portion of the Property and will also provide certain access rights with respect to the Property.

With respect to natural resource damages, Hathaway-Braley has agreed to pay $4,990 to the United States Department of the Interior and $510 to the National Oceanic and Atmospheric Administration in order to reimburse them for damage assessment costs. In addition, Hathaway-Braley has agreed to place a Conservation Easement and Restriction on the Property that will require the Property to be kept in its natural state in perpetuity.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Hathaway-Braley Wharf Co.,* Civil Action No. 03 CV 11259 (D. Mass.), DOJ No. 90–11–3–06890/1. A copy of the comments should also be sent to Donald G. Frankel, Trial Attorney, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, One Gateway Center, Suite 616, Newton, Massachusetts 02458.

The proposed Consent Decree may be examined at EPA Region 1, One Congress Street, Suite 1100, Boston, MA 02114–2023 (contact Ronald González at (617) 918–1786), and at the Office of the United States Attorney for the District of Massachusetts, 1 Courthouse Way, Boston, Massachusetts 02210 (contact Bunker Henderson at (617) 748–3272). During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547, referencing *United States* v. *Hathaway-Braley Wharf Co.,* Civil Action No. 03 CV 11259WGY (D. Mass.), DOJ No. 90–11–3–06890/1. In requesting a copy, please enclose a check in the amount of $24 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald G. Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–18052 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that a proposed consent decree in *United States and State of California* v. *Oil & Solvent Process Company, Chemical Waste Management, Inc., Fairchild Holding Corporation, and R.H. Peterson Company.,* Consolidated Cases CV 98–0760, CV 97–8230, CV 96–6634 TJH was lodged on July 3, 2003, with the United States District Court for Central District of California. The proposed Consent Decree would resolve claims against Fairchild Holding Corporation under sections 106 & 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9606 & 9607, as amended, for response costs incurred by the Environmental Protection Agency in connection with the release of hazardous substances at the San Gabriel Valley Superfund Sites, Suburban Operable Unit (''Site'') in Los Angeles, California. Under the proposed Consent Decree, the Settling Defendant will pay $750,000, of which $37,500 will be paid to the State of California and $712,500 will be paid to the Hazardous Substances Superfund to reimburse the United States for response costs incurred and to be incurred at the Site.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, PO Box 7611, Washington, DC 20044–7611, and should refer to *United States and State of California* v. *Oil & Solvent Process Company, Chemical Waste Management, Inc., Fairchild Holding Corporation, and R.H. Peterson Company.,* Consolidated Cases: CV 98–0760, CV 97–8230, CV 96–6634 TJH, DOJ Ref. # 90–11–3–1691.

The Consent Decree may be examined at the Region 9 Office of the Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105 and the United States Attorney's Office for the Central District of California, Federal Building, 300 North Los Angeles Street, Los Angeles, California 90012 c/o Assistant United States Attorney Suzette Clover. A copy of the consent decree may also be obtained by mail from the Consent Decree Library, Post Office Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.00 (25 cents per page reproduction

costs), payable to the United States Treasury.

W. Benjamin Fisherow,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–18048 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental Policy, 28 U.S.C. 50.7, notice is hereby given that on June 26, 2003, a proposed Consent Decree in *United States* v. *Tifa Realty, Inc. and Tifa Ltd.,* Civil Action No. 03–3056 (JCL) was lodged with the United States District Court for the District of New Jersey.

In this action the United States, on behalf of the United States Environmental Protection Agency (''EPA''), sought cost recovery with respect to the Asbestos Dump Superfund Site, located in Long Hill Township, Morris County, New Jersey (''the Site''), under the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA'') against Tifa Realty, Inc. and Tifa Ltd. (''Tifa''). Under the terms of the proposed settlement, Tifa will pay approximately $965,000 to reimburse the United States for costs incurred by EPA at the Site. This settlement amount is based on Tifa's limited ability to pay the full amount of EPA's unreimbursed response costs. The proposed settlement also provides for payment of $1 million by the United States, on behalf of the United States Navy and the Army Corps of Engineers, to satisfy a claim for contribution under CERCLA by Tifa. This settlement amount of behalf of the Navy and Corps will also partially reimburse EPA's response costs incurred at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Tifa Realty, Inc. and Tifa Ltd.,* D.J. Ref. 90–11–3–07175.

The Consent Decree may be examined at the Office of the United States Attorney, 970 Broad Street, 7th Floor, Newark, New Jersey 07102, and at U.S. EPA Region II, 290 Broadway, 17th Floor, New York, New York 10007–1866. During the public comment period, the Consent Decree, may also be examined on the following Department of Justice website, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $8.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 03–18053 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Tuckahoe Turf Farms, Inc. and Tuckahoe Land Investment Co.,* Civ. No. 03–157–PS (D. Maine), was lodged with the United States District Court for the District of Maine on June 26, 2003. This proposed Consent Decree concerns a complaint filed by the United States of America against Tuckahoe Turf Farms, Inc. and Tuckahoe Land Investment Co., pursuant to subsections 309(b) and (d) of the Clean Water Act, 33 U.S.C. 1319(b), (d), to obtain injunctive relief and impose civil penalties against the Defendants for unlawfully discharging dredged or fill materials into waters of the United States at two sites located in Berwick, York County, Maine.

The proposed Consent Decree requires the Defendants to pay a civil penalty for their unauthorized discharges into waters of the United States. The proposed Consent Decree further requires the Defendants to develop and complete a wetland restoration project to restore and replace ecological functions and values lost as a result of their allegedly unlawful discharge activities. In addition, the Defendants have agreed to establish and maintain a supplemental environmental project (''SEP''), which consists of a conservation easement to preserve wetland and upland buffer habitat in and around the vicinity of the sites.

The Department of Justice will receive written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this notice. Please address comments to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Attention: Joshua M. Levin, PO Box 23986, Washington, DC 20026–3986. Please refer to the matter of *United States* v. *Tuckahoe Turf Farms, Inc.,* DJ Reference No. 90–5–1–1–16745.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Maine, 156 Federal Street, Portland, Maine 04101. In addition, the proposed Consent Decree may be viewed on the World Wide Web at *http://www.usdoj.gov/enrd/enrd-home.html.*

Scott A. Schachter,

Assistant Section Chief, Environmental Defense Section, Environment and Natural Resources Division.

[FR Doc. 03–18049 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Extension of a currently approved collection, Manufacturers of Ammunition, Records and Supporting Data of Ammunition Manufactured and Disposed of.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 68, Number 75, page 19226 on April 18, 2003, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 18, 2003. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202)–395–7285.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Manufacturers of Ammunition, Records and Supporting Data of Ammunition Manufactured and Disposed of.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF REC 5000/2. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: none. Abstract: These records are used by ATF in criminal investigations and compliance inspections in fulfilling the Bureau's mission to enforce the Gun Control Law.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 50 respondents, who will take 15 minutes per line entry and that 26 entries will be made per year.

(6) *An estimate of the total public burden (in hours) associated with this collection:* An estimated 325 hours of public burden is associated with this collection.

If additional information is required contact: Mrs. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: July 2, 2003.

Brenda E. Dyer,

Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 03–17331 Filed 7–16–03; 8:45 am]

BILLING CODE 4410–FB–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

July 10, 2003.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor. To obtain documentation, contact Darrin King on 202–693–4129 (this is not a toll-free number) or e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Bureau of Labor Statistics (BLS), Office of Management and Budget, Room 10235, Washington, DC 20503 (202–395–7316/ this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Type of Review: Extension of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: General Inquiries to State Agency Contacts.

OMB Number: 1220–0168.

Affected Public: State, Local, or Tribal Government.

Frequency: As needed.

Number of Respondents: 55.

Number of Annual Responses: 23,890.

Estimated Time Per Response: Varies from 10 minutes to two hours.

Total Burden Hours: 15,762.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/ maintaining systems or purchasing services): $0.

Description: BLS awards funds to State agencies in order to jointly conduct BLS/State Labor Market Information and Occupational Safety and Health Statistics cooperative statistical programs. To ensure the timely flow of data and to be able to evaluate and improve the programs, it is necessary to conduct ongoing communications between BLS and its State partners. Whether information requests deal with program deliverables, program enhancements, or administrative issues, questions and dialogue are crucial to the successful implementation of these programs.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. 03–18090 Filed 7–16–03; 8:45 am]

BILLING CODE 4510–28–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Escape and Evacuation Plans

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public

and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506 (c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection related to the 30 CFR Sections 77.1101; Escape and Evacuation Plans.

DATES: Submit comments on or before September 15, 2003.

ADDRESSES: Send comments to Jane Tarr, Management Analyst, Administration and Management, 1100 Wilson Boulevard, Room 2171, Arlington, VA 22209–3939. Commenters are encouraged to send their comments on computer disk, or via Internet e-mail to *Tarr-Jane@Msha.Gov.* Ms. Tarr can be reached at (202) 693–9824 (voice), or (202) 693–9801 (facsimile).

FOR FURTHER INFORMATION CONTACT: Jane Tarr, Management Analyst, Records Management Group, U.S. Department of Labor, Mine Safety and Health Administration, Room 2171, 1100 Wilson Boulevard, Arlington, VA 22209–3939. Ms. Tarr can be reached at *Tarr-Jane@Msha.Gov* (Internet e-mail), (202) 693–9824 (voice), or (202) 693–9801 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 77.1101(a) requires operators of surface coal mines and surface work areas of underground coal mines to establish and keep current a specific escape and evacuation plan to be followed in the event of a fire. Section 77.1101(b) requires that all employees be instructed in current escape and evacuation plans, fire alarm signals, and applicable procedures to be followed in case of fire. The training and record keeping requirements associated with this standard are addressed under OMB No. 1219–0070 (Certificate of Training, MSHA Form 5000–23).

Section 77.1101(c) requires escape and evacuation plans to include the designation and proper maintenance of an adequate means for exiting areas where persons are required to work or travel, including buildings, equipment, and areas where persons normally congregate during the work shift.

While escape and evacuation plans are not subject to approval by MSHA district managers, MSHA inspectors evaluate the adequacy of the plans during their inspections of surface coal mines and surface work areas of underground coal mines.

II. Desired Focus of Comments

MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by accessing the MSHA home page (*http://www.msha.gov*) and then choosing ''Statutory and Regulatory Information'' and ''Federal Register Documents.''

III. Current Actions

MSHA proposes to continue the information collection requirement related to escape and evacuation plans for surface coal mines and surface work areas of underground coal mines for an additional 3 years. MSHA believes that eliminating these requirements would expose miners to unnecessary risk of injury or death should a fire occur at or near their work location.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Escape and Evacuation Plans.

OMB Number: 1219–0051.

Recordkeeping: Indefinite.

Frequency: On occasion.

Affected Public: Business or other for-profit.

Respondents: 183.

Average Time Per Respondent: 4.8 hours.

Total Burden Hours: 878 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated at Arlington, VA, this 8th day of July, 2003.

David L. Meyer,

Director, Office of Administration and Management.

[FR Doc. 03–18091 Filed 7–16–03; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Records of Preshift and Onshift Inspections of Slope and Shaft Areas (Pertains to Slope and Shaft Sinking Operation at Coal Mines)

AGENCY: Mine Safety and Health Administration, DOL.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506 (c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection related to the 30 CFR Sections 77.1901—Records of Preshift and Onshift Inspections of Slope and Shaft Areas.

DATES: Submit comments on or before September 15, 2003.

ADDRESSES: Send comments to Jane Tarr, Management Analyst, Administration and Management 1100 Wilson Boulevard, Room 2171, Arlington, VA 22209–3939. Commenters are encouraged to send their comments

on computer disk, or via Internet E-mail to *Tarr-Jane@Msha.Gov.* Ms. Tarr can be reached at (202) 693–9824 (voice), or (202) 693–9801 (facsimile).

FOR FURTHER INFORMATION CONTACT: Jane Tarr, Management Analyst, Records Management Group, U.S. Department of Labor, Mine Safety and Health Administration, Room 2171, 1100 Wilson Boulevard, Arlington, VA 22209–3939. Ms. Tarr can be reached at *Tarr-Jane@Msha.Gov* (Internet E-mail), (202) 693–9824 (voice), or (202) 693–9801 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 77.1901 requires operators to conduct examinations of slope and shaft areas for hazardous conditions, including tests for methane and oxygen deficiency, within 90 minutes before each shift, once during each shift, and before and after blasting. The surface area surrounding each slope and shaft is also required to be inspected for hazards.

Section 77.1901 also requires that records be kept of the results of the inspections. The record includes a description of any hazardous condition found and the corrective action taken to abate it. These records are necessary to ensure that the inspections and tests are conducted in a timely fashion and that corrective action is taken when hazardous conditions are identified, thereby ensuring a safe working environment for the slope and shaft sinking employees. The record is maintained at the mine site for the duration of the operation.

II. Desired Focus of Comments

MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by accessing the MSHA home page (*http://www.msha.gov*) and then choosing ''Statutory and Regulatory Information'' and ''Federal Register Documents.''

III. Current Actions

Section 77.1901 requires operators to conduct examinations of slope and shaft areas for hazardous conditions, including tests for methane and oxygen deficiency, within 90 minutes before each shift, once during each shift, and before and after blasting. The surface area surrounding each slope and shaft is also required to be inspected for hazards. Section 77.1901 also requires that records be kept of the results of the inspections.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Records of Preshift and Onshift Inspections of Slope and Shaft Areas.

OMB Number: 1219–0082.

Recordkeeping: The standard also requires that a record be kept of the results of the inspections. The record includes a description of any hazardous condition found and the corrective action taken to abate it. The record is necessary to ensure that the inspections and tests are conducted in a timely fashion and that corrective action is taken when hazardous conditions are identified, thereby ensuring a safe working environment for the slope and shaft sinking employees. The record is maintained at the mine site for the duration of the operation.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Respondents: 35.

Average Time Per Response: 1.25 hours.

Total Burden Hours: 14,823 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated at Arlington, Virginia, this 8th day of July, 2003.

David L. Meyer,

Director, Office of Administration and Management.

[FR Doc. 03–18092 Filed 7–16–03; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0183(2003)]

Standard on 4,4′-Methylenedianiline Construction (29 CFR 1926.60); Extension of the Office of Management and Budget's Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor

ACTION: Request for comment.

SUMMARY: OSHA requests comment concerning its proposed extension of the information-collection requirements specified by the Standard on 4,4′-Methylenedianiline Construction (29 CFR 1926.60). The standard protects employees from the adverse health effects that may result from occupational exposure to MDA, including cancer, and liver and skin disease.

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be submitted (postmarked or received) by September 15, 2003.

Facsimile and electronic transmission: Your comments must be sent by Septembr 15, 2003.

ADDRESSES:

I. Submission of Comments

Regular mail, express delivery, hand-delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Docket No. ICR–1218–0183(2003), Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., EST.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number ICR 1218–0183(2003), in your comments.

Electronic: You may submit comments, but not attachments, through the Internet at *http://ecomments.osha.gov.*

II. Obtaining Copies of the Supporting Statement for the Information Collection Request

The Supporting Statement for the Information Collection Request is available for downloading from OSHA's Web site at *www.osha.gov.* The supporting statement is available for inspection and copying in the OSHA

Docket Office, at the address listed above. A printed copy of the supporting statement can be obtained by contacting Todd Owen at (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information-collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimized, collection instruments are understandable, and OSHA's estimate of the information-collection burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The information-collection requirements specified in the 4′,4′-Methylenedianiline Standard for Construction (the ''MDA Standard'') protect employees from the adverse health effects that may result from their exposure to MDA, including cancer, and liver and skin disease. The major paperwork requirements specify that employers must perform initial, periodic, and additional exposure monitoring; within 15 days after receiving exposure-monitoring results, notify each employee in writing of their results; and routinely inspect the hands, face, and forearms of each employee potentially exposed to MDA for signs of dermal exposure to MDA. Employers must also: Establish a written compliance program; institute a respiratory-protection program in accordance with 29 CFR 1910.134 (OSHA's Respiratory Protection Standard); and develop a written emergency plan for any construction operation that could have an emergency (*i.e.*, an unexpected and potentially hazardous release of MDA).

Employers are to label any material or products containing MDA, including containers used to store MDA-contaminated protective clothing and equipment. They also must inform personnel who launder MDA-contaminated clothing of the requirement to prevent release of MDA, while personnel who launder or clean MDA-contaminated protective clothing or equipment must receive information about the potentially harmful effects of MDA. In addition, employers are to post warning signs at entrances or accessways to regulated areas, as well as train employees exposed to MDA at the time of their initial assignment, and at least annually thereafter.

Other paperwork provisions of the MDA Standard require employers to provide employees with medical examinations, including initial, periodic, emergency and follow-up examinations. As part of the medical-surveillance program, employers must ensure that the examining physician receives specific written information, and that they obtain from the physician a written opinion regarding the employee's medical results and exposure limitations.

The MDA Standard also specifies that employers are to establish and maintain exposure-monitoring and medical-surveillance records for each employee who is subject to these respective requirements, make any required record available to OSHA compliance officers and the National Institute for Occupational Safety and Health (NIOSH) for examination and copying, and provide exposure-monitoring and medical-surveillance records to employees and their designated representatives. Finally, employers who cease to do business within the period specified for retaining exposure-monitoring and medical-surveillance records, and who have no successor employer, must notify NIOSH at least 90 days before disposing of the records and transmit the records to NIOSH if so requested.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information-collection and transmission techniques.

III. Proposed Actions

OSHA proposes to extend the Office of Management and Budget's (OMB) approval of the collection-of-information requirements specified by the Standards on 4,4′-Methylenedianiline Construction (29 CFR 1926.60). The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend in the approval of these information-collection requirements.

Type of Review: Extension of a currently approved information-collection requirement.

Title: Standard on 4,4′-Methylenedianiline Construction (29 CFR 1926.60).

OMB Number: 1218–0183.

Affected Public: Business or other for-profit, not-for-profit institutions; Federal government; State, local, or tribal Governments.

Number of Respondents: 66.

Frequency of Recordkeeping: On occasion.

Average Time per Response: Varies from one minute (.08 hour) to provide information to the physician and 2 hours for initial monitoring.

Total Annual Hours Requested: 1,609.

Estimated Cost (Operation and Maintenance): $80,437.

IV. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed at Washington, DC, on July 14, 2003.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 03–18108 Filed 7–16–03; 8:45 am]

BILLING CODE 4510–26–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–395]

South Carolina Electric and Gas, Virgil C. Summer Nuclear Station; Notice of Availability of the Draft Supplement 15 to the Generic Environmental Impact Statement and Public Meeting for the License Renewal of Virgil C. Summer Nuclear Station

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has published a draft plant-specific supplement to the Generic Environmental Impact Statement (GEIS), NUREG–1437, regarding the renewal of Operating License NPF–12 for an additional 20 years of operation at Virgil C. Summer Nuclear Station (V.C. Summer) and will hold a public meeting to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. V.C. Summer is located in Fairfield County, South Carolina. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

The draft supplement to the GEIS is available electronically for public inspection in the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm.html* (the Public Electronic Reading Room). Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* In addition, the Thomas Cooper Library, located at 1322 Greene Street, Columbia, South Carolina 29208, and the Fairfield County Library, located at 300 Washington Street, Winnsboro, South Carolina 29180, have agreed to make the draft supplement to the GEIS available for public inspection.

Any interested party may submit comments on the draft supplement to the GEIS for consideration by the NRC staff. To be certain of consideration, comments on the draft supplement to the GEIS and the proposed action must be received by October 3, 2003. Comments received after the due date will be considered if it is practical to do so, but the NRC staff is able to assure consideration only for comments received on or before this date. Written comments on the draft supplement to the GEIS should be sent to: Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop T–6D 59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Comments may be hand-delivered to the NRC at 11545 Rockville Pike, Rockville, Maryland, between 7:45 a.m. and 4:15 p.m. on Federal workdays. Electronic comments may be submitted to the NRC by e-mail at *VCSummerEIS@nrc.gov.* All comments received by the Commission, including those made by Federal, State, and local agencies, Indian tribes, or other interested persons, will be made available electronically at the Commission's PDR in Rockville, Maryland, and from the PARS component of NRC's ADAMS.

The NRC staff will hold a public meeting to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. The public meeting will be held on August 26, 2003, at White Hall A.M.E. Church in the Fellowship Room, 8594 State Highway 215 South, Jenkinsville, South Carolina. There will be two sessions to accommodate interested parties. The first session will commence at 1:30 p.m. and will continue until 4:30 p.m. The second session will commence at 7 p.m. and will continue until 10 p.m. Both meetings will be transcribed and will include (1) a presentation of the contents of the draft plant-specific supplement to the GEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed below. Persons may pre-register to attend or present oral comments at the meeting by contacting Mr. Gregory F. Suber, by telephone at 1–800–368–5642, extension 1124, or by e-mail at *gxs@nrc.gov* no later than August 20, 2003. Members of the public may also register to provide oral comments within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Mr. Suber's attention no later than August 18, 2003, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

FOR FURTHER INFORMATION CONTACT: Mr. Gregory F. Suber, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Mr. Suber may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 9th day of July, 2003.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Program Director, License Renewal and Environmental Impacts, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 03–18085 Filed 7–16–03; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Changes in Domestic Mail Classifications

AGENCY: Postal Service.

ACTION: Notice of implementation of changes to the Domestic Mail Classification Schedule.

SUMMARY: This notice sets forth the changes to the Domestic Mail Classification Schedule to be implemented as a result of the Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission Approving Stipulation and Agreement for Customized Market Mail Minor Classification Changes, Docket No. MC2003–1.

EFFECTIVE DATE: August 10, 2003.

FOR FURTHER INFORMATION CONTACT: Daniel J. Foucheaux, Jr., (202) 268–2989.

SUPPLEMENTARY INFORMATION: On March 14, 2003, the United States Postal Service, in conformance with section 3623 of the Postal Reorganization Act (39 U.S.C. 101 *et seq.*), filed a request for a recommended decision by the Postal Rate Commission (PRC) on the establishment of Customized Market Mail as a minor classification change. The PRC designated this filing as Docket No. MC2003–1. On June 6, 2003, pursuant to 39 U.S.C. 3624, the PRC issued to the Governors of the Postal Service its Opinion and Recommended Decision Approving Stipulation and Agreement on Customized Market Mail Minor Classification Changes, Docket

No. MC2003–1. The PRC recommended that the Postal Service proposal for Customized Market Mail be established as a permanent classification.

Pursuant to 39 U.S.C. 3625, the Governors of the United States Postal Service acted on the PRC's recommendations on June 27, 2003. In the Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission Approving Stipulation and Agreement for Customized Market Mail Minor Classification Changes, Docket No. MC2003–1, the Governors of the Postal Service approved the recommended decision. In accordance with Resolution 03–9, the Board of Governors established an implementation date of August 10, 2003 on which the approved classifications for Customized Market Mail take effect. The attachments to the Governors' Decision, setting forth the classification changes ordered into effect by the Governors, are set forth below.

In accordance with the Decision of the Governors and Resolution No. 03–9 of the Board of Governors, the Postal Service hereby gives notice that the classification changes set forth below will become effective at 12:01 a.m. on August 10, 2003.

Attachment A to the Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission Approving Stipulation and Agreement for Customized Market Mail Minor Classification Changes, Docket No. MC2003–1 (Additions Underlined; Deletions in Brackets)

STANDARD MAIL RATE SCHEDULE 321A; REGULAR PRESORTED CATEGORIES

	Rate
Letter, minimum piece rate:	
Piece Rate	
Basic	$0.268
3/5-digit	0.248
Destination Entry Discounts	
BMC	0.021
SCF	0.026
Nonletters, minimum piece rate:	
Piece Rate	
Basic	0.344
3/5-digit	0.288
Destination Entry Discounts	
BMC	0.021
SCF	0.026
Nonletters, piece and pound rate:	
Piece Rate	
Basic	0.198
3/5-digit	0.142
Pound Rate	0.708

STANDARD MAIL RATE SCHEDULE 321A; REGULAR PRESORTED CATEGORIES—Continued

	Rate
Destination Entry Discounts (off pound rate)	
BMC	0.100
SCF	0.125

Schedule 321A Notes:

1. A fee of $150.00 must be paid each 12-month period for each bulk mailing permit.

2. Residual shape pieces are subject to a surcharge of $0.23 per-piece. For parcel barcode discount, deduct $0.03 per-piece (machinable parcels only).

3. For nonletters, the mailer pays either the minimum piece rate or the pound rate, whichever is higher.

4. Nonmachinable letters are subject to a $0.04 nonmachinable surcharge.

5. Pieces entered as Customized Market Mail, as defined in DMCS section 321.22, are subject to the nondestination entry, nonletter minimum per-piece basic rate and the residual shape surcharge.

STANDARD MAIL RATE SCHEDULE 323A; NONPROFIT PRESORTED CATEGORIES

	Rate
Letters, minimum piece rate:	
Piece Rate	
Basic	$0.165
3/5-digit	0.153
Destination Entry Discounts	
BMC	0.021
SCF	0.026
Nonletters, minimum piece rate:	
Piece Rate	
Basic	0.230
3/5-digit	0.183
Destination Entry Discounts	
BMC	0.021
SCF	0.026
Nonletters, piece and pound rate:	
Piece Rate	
Basic	0.110
3/5-digit	0.063
Pound Rate	0.584
Destination Entry Discounts (off pound rate)	
BMC	0.100
SCF	0.125

Schedule 323A Notes:

[1] A fee of $150.00 must be paid each 12-month period for each bulk mailing permit.

[2] Residual shape pieces are subject to a surcharge of $0.23 per-piece. For parcel barcode discount, deduct $0.03 per-piece (nonmachinable parcels only).

[3] For nonletters, the mailer pays either the minimum piece rate or the pound rate, whichever is higher.

[4] Nonmachinable letters are subject to a $0.02 nonmachinable surcharge.

[5] *Pieces entered as Customized Market Mail, as defined in DMCS sections 321.22 and 323.22, are subject to the nondestination entry, nonletter minimum per-piece basic rate and the residual shape surcharge.*

Attachment B to the Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission Approving Stipulation and Agreement for Customized Market Mail Minor Classification Changes, Docket No. MC2003–1 (Additions Underlined; Deletions in Brackets)

First-Class Mail Classification Schedule

210 DEFINITION

Any matter eligible for mailing*, except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22,* may, at the option of the mailer, be mailed as First-Class Mail. The following must be mailed as First-Class Mail, unless mailed as Express Mail or exempt under title 39, United States Code, or except as authorized under sections 344.12, 344.23 and 443:

a. Mail sealed against postal inspection as set forth in section 5000;

b. Matter wholly or partially in handwriting or typewriting except as specifically permitted by sections 312, 313, 520, 544.2, and 446;

c. Matter having the character of actual and personal correspondence except as specifically permitted by sections 312, 313, 520, 544.2, and 446; and

d. Bills and statements of account.

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Standard Mail Classification Schedule

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320 DESCRIPTION OF SUBCLASSES

321 Regular Subclass

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321.2 Presort Rate Categories

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321.22 Basic Rate Categories.

The basic rate categories apply to presort rate category mail not mailed under section 321.23*, and to all mail entered as Customized Market Mail (CMM). CMM must be marked and bear endorsements as specified by the Postal Service, and must meet the preparation, addressing, and acceptance requirements specified by the Postal Service. Notwithstanding section 6020, Customized Market Mail may be nonrectangular in shape. The following size standards apply to Customized Market Mail:*

a. Thickness: at least 0.007 inch and no more than 0.75 inch.

b. Length: at least 5 inches and no more than 15 inches, measured for nonrectangular shapes as specified by the Postal Service.

c. Height: at least 3.5 inches and no more than 12 inches, measured for nonrectangular shapes as specified by the Postal Service.

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321.4 Destination Entry Discounts

The destination entry discounts apply to Regular subclass mail, *except Regular Presort category mail entered as Customized Market Mail under section 321.22,* prepared as specified by the Postal Service and addressed for delivery within the service area of the BMC (or auxiliary service facility), or sectional center facility (SCF), at which it is entered, as defined by the Postal Service.

321.5 Residual Shape Surcharge

Regular subclass mail is subject to a surcharge if it is *entered as Customized Market Mail under section 321.22 or is* prepared as a parcel or if it is not letter or flat shaped.

321.6 Barcode Discount

The barcode discount applies to Regular Subclass mail, *except Regular Presort category mail entered as Customized Market Mail under section 321.22,* that is subject to the residual shape surcharge in 321.5, is entered at designated facilities, bears a barcode specified by the Postal Service, is prepared as specified by the Postal Service, and meets all other preparation and machinability requirements of the Postal Service.

321.7 Nonmachinable Surcharge

The nonmachinable surcharge applies to Regular presort category letter-sized pieces, *except Regular Presort category mail entered as Customized Market Mail under section 321.22,* (i) that do not meet the machinability requirements specified by the Postal Service; or (ii) for which manual processing is requested.

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323 Nonprofit Subclass

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323.2 Presort Rate Categories

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323.22 Basic Rate Categories.

The basic rate categories apply to presort rate category mail not mailed under section 322.23, *and to all mail entered as Customized Market Mail, as defined in section 321.22.*

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323.4 Destination Entry Discounts

Destination entry discounts apply to Nonprofit subclass mail, *except Nonprofit Presort category mail entered as Customized Market Mail under section 323.22,* prepared as specified by the Postal Service and addressed for delivery within the service area of the BMC (or auxiliary service facility) or sectional center facility (SCF) at which it is entered, as defined by the Postal Service.

323.5 Residual Shape Surcharge

Nonprofit subclass mail is subject to a surcharge if it is *entered as Customized Market Mail under section 323.22 or is* prepared as a parcel or if it is not letter or flat shaped.

323.6 Barcode Discount

The barcode discount applies to Nonprofit subclass mail, *except Nonprofit Presort category mail entered as Customized Market Mail under section 323.22,* that is subject to the residual shape surcharge in 323.5, is entered at designated facilities, bears a barcode specified by the Postal Service, is prepared as specified by the Postal Service and meets all other preparation and machinability requirements of the Postal Service.

323.7 Nonmachinable Surcharge

The nonmachinable surcharge applies to Nonprofit presort category letter-sized pieces, *except Nonprofit Presort category mail entered as Customized Market Mail under section 323.22,* (i) that do not meet the machinability requirements specified by the Postal Service; or (ii) for which manual processing is requested.

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330 PHYSICAL LIMITATIONS

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340 POSTAGE AND PREPARATION

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344 Attachments and Enclosures

344.1 General

First-Class Mail may be attached to or enclosed in Standard Mail, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22.* The piece must be marked as specified by the Postal Service. Except as provided in section 344.2, additional postage must be paid for the attachment or enclosure as if it had been mailed separately. Otherwise, the entire combined piece is subject to the First-Class rate for which it qualifies.

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350 DEPOSIT AND DELIVERY

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353 Forwarding and Return

Undeliverable-as-addressed Standard Mail, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22,* will be returned on request of the mailer, or forwarded and returned on request of the mailer. Undeliverable-as-addressed combined First-Class and Standard Mail pieces will be returned as specified by the Postal Service. Except as provided in section 935, the applicable First-Class Mail rate is charged for each piece receiving return only service. Except as provided in section 936, charges for forwarding-and-return service are assessed only on those pieces which cannot be forwarded and are returned. Except as provided in sections 935 and 936, the charge for those returned pieces is the appropriate First-Class Mail rate for the piece plus that rate multiplied by a factor equal to the number of Standard Mail pieces nationwide that are successfully forwarded for every one piece that cannot be forwarded and must be returned.

360 ANCILLARY SERVICES

361 All Subclasses

All Standard Mail, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22,* will receive the following services upon payment of the appropriate fees:

Service	Schedule
a. Address correction	911
b. Certificates of mailing indicating that a specified number of pieces have been mailed	947

Certificates of mailing are not available for Standard Mail when postage is paid with permit imprint.

362 Regular and Nonprofit

362.1 Regular and Nonprofit subclass mail, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22,* will receive the following additional services upon payment of the appropriate fees.

Service	Schedule
a. Bulk Parcel Return Service	935
b. Shipper-Paid Forwarding	936

362.2 Regular and Nonprofit subclass mail subject to the residual shape surcharge in 321.5 and 323.6, respectively, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under*

sections 321.22 and 323.22, will receive the following additional services upon payment of the appropriate fees.

Service	Schedule
a. Bulk Insurance	943
b. Return Receipt (merchandise only)	945
c. Delivery Confirmation	948

Bulk insurance may not be used selectively for individual pieces in a multi-piece Standard Mail mailing unless specific methods approved by the Postal Service for determining and verifying postage are followed.

363 Regular

Regular subclass mail*, except Regular Presort category mail entered as Customized Market Mail under sections 321.22,* will receive the following additional services upon payment of the appropriate fees:

Service	Schedule
a. Netpost Mailing Online	981

365 Nonprofit

Nonprofit subclass mail*, except Nonprofit Presort category mail entered as Customized Market Mail under sections 323.22,* will receive the following additional services upon payment of the appropriate fees:

Service	Schedule
a. Netpost Mailing Online (starting on a date to be specified by the Postal Service)	981

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Package Services Classification Schedule

510 DEFINITION

511 General

Any mailable matter may be mailed as Package Services mail except:

a. Matter required to be mailed as First-Class Mail;

b. Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22; and

[b]*c.* Copies of a publication that is entered as Periodicals class mail, except copies sent by a printer to a publisher, and except copies that would have traveled at the former second-class transient rate. (The transient rate applied to individual copies of second-class mail (currently Periodicals class mail) forwarded and mailed by the public, as well as to certain sample copies mailed by publishers.)

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Special Services Classification Schedule

910 ADDRESSING

911 ADDRESS CORRECTION SERVICE

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911.2 Availability

911.21 Address Correction service is available to mailers of postage prepaid mail of all classes, except for mail addressed for delivery by military personnel at any military installation and *Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22.* Address Correction Service is mandatory for Periodicals class mail.

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940 ACCOUNTABILITY AND RECEIPTS

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943 INSURANCE

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943.2 General Insurance

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943.22 Availability

943.221 General Insurance is available for mail sent under the following classification schedules:

a. First-Class Mail, if containing matter that may be mailed as Standard Mail or Package Services;

b. Package Services;

c. Regular and Nonprofit subclasses of Standard Mail, for Bulk Insurance only, for mail subject to residual shape surcharge, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22.*

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945 RETURN RECEIPT

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945.2 Return Receipt for Merchandise

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945.22 Availability.

945.221 Return Receipt for Merchandise is available for merchandise sent under the following sections or classification schedules:

a. Priority Mail*;*

b. Standard Mail pieces subject to the residual shape surcharge, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22;*

c. Package Services.

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947 CERTIFICATE OF MAILING

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947.2 Availability

947.21 Certificate of Mailing service is available for matter sent using any class of mail, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22.*

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948 DELIVERY CONFIRMATION

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948.2 Availability

948.21 Delivery Confirmation service is available for First-Class Letters and Sealed Parcels subclass mail that is parcel-shaped, as specified by the Postal Service; Priority Mail; Standard Mail, in the Regular and Nonprofit subclasses, that is subject to the residual shape surcharge, *except Regular and Nonprofit Presort category mail entered as Customized Market Mail under sections 321.22 and 323.22;* and Package Services mail that is parcel-shaped, as specified by the Postal Service.

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General Definitions, Terms and Conditions

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6000 MAILABLE MATTER

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6020 Minimum Size Standards

Except as provided in sections 321.22 and 323.22, [T]the following minimum size standards apply to all mailable matter:

a. All items must be at least 0.007 inch thick, and

b. All items, other than keys and identification devices, which are 0.25 inch thick or less must be

i. Rectangular in shape,

ii. At least 3.5 inches in width, and

iii. At least 5 inches in length.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 03–18109 Filed 7–16–03; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application To Withdraw From Listing and Registration on the American Stock Exchange LLC (CyberGuard Corporation, Common Stock, $.01 Par Value) File No. 1–31350

July 11, 2003.

CyberGuard Corporation, a Florida corporation (''Issuer''), has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its Common Stock, $.01 par value (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'' or ''Exchange'').

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in the State of Florida, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer states that the Security began trading on the Nasdaq National Market on July 8, 2003. The Issuer states that it believes that the withdrawal of its Security from listing and registration on the Amex is in the best interest of the Issuer's shareholders because the addition of financial services firms as market makers should increase the Issuer's visibility and the capital market's understanding of the Issuer.

The Issuer's application relates solely to the withdrawal of the Securities from listing on the Amex and from registration under section 12(b) of the Act[3] shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before August 5, 2003, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 03–18064 Filed 7–16–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48152; File No. SR–Amex–2003–62]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the American Stock Exchange LLC Relating to the Listing and Trading of Partial Principal Protected Notes Linked to the Performance of the Standard & Poor's 500 Stock Index

July 10, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 17, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposed to list and trade under Section 107A of the Amex *Company Guide* (''*Company Guide*''), notes linked to the performance of the Standard & Poor's 500 Index (''S&P 500'' or ''Index'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Under Section 107A of the *Company Guide,* the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[3] The Amex proposes to list, under Section 107A of the Company Guide, notes for trading on the Exchange, the performance of which is linked to the Index that provide for partial principal protection (the ''Partial Principal Protected Notes'' or ''Notes'').[4] The Index is determined, calculated and maintained solely by S&P.[5] The Notes will provide for participation in the positive performance of the S&P 500 during their term subject to a maximum payment amount or ceiling while also reducing the risk exposure to the principal investment amount.

The Notes will initially conform to the listing guidelines under Section 107A of the *Company Guide*[6] and

[5] 17 CFR 200.30–3(a)(1).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (SR–Amex–89–29).

[4] UBS AG (''UBS'') and Standard & Poor's Corporation (''S&P''), a division of The McGraw-Hill Companies, Inc., have entered into a non-exclusive license agreement providing for the use of the index by UBS and certain affiliates and subsidiaries in connection with certain securities including these Notes. S&P is not responsible and will not participate in the issuance and creation of the Notes.

[5] The S&P 500 is a broad-based stock index, which provides an indication of the performance of the U.S. equity market. The Index is a capitalization-weighted index reflecting the total market value of 500 widely-held component stocks relative to a particular base period. The Index is computed by dividing the total market value of the 500 stocks by an Index divisor. The Index Divisor keeps the Index comparable over time to its base period of 1941–1943 and is the reference point for all maintenance adjustments. The securities included in the Index are listed on the Amex, New York Stock Exchange, Inc. (''NYSE'') or traded through Nasdaq Stock Market, Inc. (''Nasdaq''). The Index reflects the price of the common stocks of 500 companies without taking into account the value of the dividend paid on such stocks.

[6] The initial listing standards for the Notes require: (1) A market value of at least $4 million; and (2) a term of at least one year. Because the Notes will be issued in $1,000 denominations, the minimum public distribution requirement of one million units and the minimum holder requirement of 400 shareholders do not apply. In addition, the listing guidelines provide that the issuer has assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in

Continued

continued listing guidelines under Sections 1001–1003 [7] of the *Company Guide.* The Notes are senior non-convertible debt securities of UBS AG (''UBS''). The Notes will have a term of not less than one, nor more than ten years. UBS will issue the Notes in denominations of whole units (a ''Unit''), with each Unit representing a single Note. The original public offering price will be $1,000 per Unit. The Notes will entitle the owner at maturity to receive an amount based upon the percentage change of the Index, subject to a guaranteed minimum amount of $1,000 if the Index declines up to 20% during the term. At maturity, if the value of the Index has increased over the term of the Notes, a beneficial owner will be entitled to receive a payment on the Notes equal to the principal amount plus 100% of the percentage change of the Index, subject to a maximum return amount of 100% [8] (''Maximum Return Amount''). If the percentage change of the Index over the term of the Notes is between 0% and −20%, a holder of the Notes will receive the full principal amount of $1,000 per Unit. However, if the return of the Index is less than −20%, a holder will receive a payment at maturity of the original principal amount reduced by 1% for each percentage point that the percentage change in the Index is below −20%. Accordingly, the Notes provide ''partial principal protection'' with the potential for holders to lose 80% of their investment if the Index sustains a loss of 100%. The Notes are also not callable by the Issuer.

The payment that a holder or investor of a Note will be entitled to receive (the ''Redemption Amount'') depends on the change of the level of the Index during the term of the Notes as measured by the final and initial index levels. The Index final level is the level of the S&P 500 at the close of the market five (5) business days before the maturity date of the Notes indicated in the prospectus, unless the final valuation date and the maturity date are postponed due to a market disruption event (the ''Final Level'').[9] The Index initial level is the closing level of the S&P 500 on the date the Notes are priced for initial sale to the public (the ''Initial Level'').

If the Final Level is greater than the Initial Level, the Redemption Amount per Unit will equal:

$$\$10 + \left(\$30 \times \left(\frac{\text{Ending Value} - \text{Starting Value}}{\text{Starting Value}}\right)\right) \text{ not to exceed the Capped Value.}$$

If the percentage change of the Index is between 0% and −20%, the Redemption Amount per Unit will equal $1,000.

If the percentage change of the Index is less than −20%, the Redemption Amount per Unit will equal:

$$\$10 \times \left(\frac{\text{Ending Value}}{\text{Starting Value}}\right)$$

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments or any other ownership right or interest in the portfolio or index of securities comprising the Index. The Notes are designed for investors who want to participate or gain exposure to the Index, subject to a maximum return amount, while partially limiting their investment risk, and who are willing to forego market interest payments on the Notes during such term and are willing to accept a limited return. The Commission has previously approved the listing of securities and related options linked to the performance of the Index.[10]

As of June 11, 2003, the market capitalization of the securities included in the S&P 500 ranged from a high of $305.3 billion to a low of $388.5 million. The average daily trading volume for these same securities for the last six (6) months ranged from a high of 50.3 million shares to a low of 148,223 shares. The Index value will be disseminated at least once every fifteen (15) seconds throughout the trading day.

Because the Notes are issued in $1,000 denominations, the Amex's existing floor trading rules will apply to the trading of the Notes. First, pursuant to Amex Rule 411, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.[11] Second, even though the Exchange's debt trading rules apply,[12] the Notes will be subject to the equity margin rules of the Exchange.[13] Third, the Exchange will, prior to trading the Notes, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the Notes and highlighting the special risks and characteristics of the Notes. With

Section 101 of the *Company Guide,* the Exchange will require the issuer to have the following: (1) Assets in excess of $200 million and stockholders equity of at least $10 million, or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[7] The Exchange's continued listing guidelines are set forth in Sections 1001 through 1003 of Part 10 to the Exchange's *Company Guide.* Section 1002(b) of the *Company Guide* states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in Section 1003(b)(iv), Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principle amount of bonds publicly held is less than $400,000.

[8] Amex staff clarified that the maximum return amount for the proposed Notes is $1,000 per Unit or 100%. Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex and Tim Fox, Attorney, Commission on June 24, 2003.

[9] Amex staff confirmed that both the maturity date and the final valuation date would move as a result of a market disruption event. Telephone conversation between Jeffery P. Burns, Associate General Counsel, Amex, and Tim Fox, Attorney, Commission on June 24, 2003.

[10] *See* Securities Exchange Act Release Nos. 19907 (June 24, 1983), 48 FR 30814 (July 5, 1983) (SR–CBOE–83–08) (approving the listing and trading of options on the S&P 500 Index on the CBOE); 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (SR–Amex–92–18) (approving the listing and trading of Portfolio Depositary Receipts based on the S&P 500 Index on the Amex); 27382 (October 26, 1989), 54 FR 45834 (October 31, 1989) (SR–NYSE–89–05) (approving the listing and trading of Exchange Stock Portfolios based on the value of the S&P 500 Index on the NYSE); 30394 (February 21, 1992), 57 FR 7409 (March 2, 1992) (SR–Amex–90–06) (approving the listing and trading of a unit investment trust linked to the S&P 500 Index); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (SR–Amex–2003–46) (approving the listing and trading of notes linked to the S&P 500 on the Amex); and 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (SR–Amex–2003–45) (approving the listing and trading of a note issued by CSFB linked to S&P 500 on the Amex).

[11] Amex rule 411 requires that every member, member firm or member corporation use due diligence to learn the essential facts, relative to every customer and to every order or account accepted.

[12] Amex staff represented that the relevant debt trading rules are contained in Amex Rules 100–140. Telephone conversation between Jeffery P. Burns, Associate General Counsel, Amex and Tim Fox, Attorney, Commission on June 24, 2003.

[13] *See* Amex Rule 462.

respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction. In addition, UBS will deliver a prospectus in connection with the initial sales of the Notes.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, the Exchange will rely on its existing surveillance procedures governing equities, which have been deemed adequate under the Act. In addition, the Exchange also has a general policy, which prohibits the distribution of material, non-public information by its employees.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [14] in general, and furthers the objectives of Section 6(b)(5),[15] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not solicit or receive any written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR–Amex–2003–62 and should be submitted by August 7, 2003.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) of the Act.[16] The Commission finds that this proposal is similar to several instruments currently listed and traded on the Amex that the Commission recently approved.[17] Accordingly, the Commission finds that the listing and trading of the Notes based on the Index is consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing and settling, processing information with respect to, and facilitating transactions in securities, and, in general, protect investors and the public interest consistent with Section 6(b)(5) of the Act.[18]

As described more fully above, at maturity, the holder of a Note will receive an amount based upon the percentage change of the Index. Specifically, at maturity, if the value of the Index has increased over the term of the Notes, the beneficial owner will be entitled to receive a payment on the Notes equal to the principal amount plus the percentage change of the Index, subject to a maximum return of 100%. If the Note declines up to 20% during the term, the beneficial owner will receive the full principal amount of $1,000 per Unit. However, if the return of the Index is less than −20%, a holder will receive a payment at maturity of the original principal amount reduced by 1% for each percentage point that the percentage change in the Index is below −20%.

The Commission notes that the Notes are non-leveraged, ''partial principal protection'' instruments, with the potential for holders to lose 80% of their investment if the Index sustains a loss of 100%. The Notes are debt instruments whose price will be derived and based upon the value of the Index. The Notes, at a minimum, will pay the beneficial owner 20% of the principal amount at maturity. Thus, if the value of the Index has declined more than 20% at maturity, the holder of the Note will receive less than the original public offering price of the Note. Accordingly, the level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Because the final rate of return of the Notes is derivatively priced and based upon the performance of an index of securities, and because the Notes are debt instruments that do not guarantee a return of principal beyond 20%, and because investors' potential return is limited by the Maximum Return Amount, if the value of the Index has increased over the term of such note, there are several issues regarding the trading of this type of product. However, for the reasons discussed below, the Commission believes the Exchange's proposal adequately addresses the concerns raised by this type of product.

First, the Commission notes that the Exchange's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the Notes. In particular, by imposing the hybrid listing standards, suitability, disclosure, and compliance requirements noted above, the Commission believes that the Exchange has addressed adequately the potential problems that could arise from the hybrid nature of the Notes. The Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes to: (1) Determine that such

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(5).

[17] *See* Securities Exchange Act Release Nos. 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (SR–Amex–2003–45) (approval of the listing and trading of CSFB non-principal protected notes linked to the S&P 500); 47911 (May 22, 2003), 63 FR 32558 (May 30, 2003) (SR–Amex–2003–46) (approving the listing and trading of non-principal protected notes linked to the S&P 500); 46883 (November 21, 2002), 67 FR 71216 (November 29, 2002) (SR–Amex–2002–88) (approving the listing and trading of non-principal protected notes linked to the DJIA).

[18] 15 U.S.C. 78f(b)(5). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

transaction is suitable for the customer; and (2) have a reasonable basis for believing that the customer can evaluate the special characteristics, and bear the financial risks, of such a transaction. Moreover, the Commission notes that the Exchange will distribute a circular to its membership calling attention to the specific risks associated with the Notes and the compliance responsibility when handling transactions in the Notes. The Commission also notes that UBS will deliver a prospectus in connection with the initial sale of the Notes. In addition, the Commission notes that Amex will incorporate and rely upon its existing surveillance procedure governing equities, which have been deemed adequate under the Act. Moreover, the Commission also notes that the Exchange has a general policy that prohibits the distribution of material, non-public information by its employees.

In approving the product, the Commission recognizes that the Index is a capitalization-weighted index of 500 companies listed on Nasdaq, the NYSE, and the Amex. The Commission notes that the Index is determined, calculated, and maintained by S&P. As of June 11, 2003, the market capitalization of the securities included in the S&P 500 ranged from a high of $305.3 billion to a low of $388.5 million. The average daily trading volume for these same securities for the last six (6) months ranged from a high of 50.3 million shares to a low of 148,223 shares.

Given the large trading volume and capitalization of the compositions of the stocks underlying the Index, the Commission believes that the listing and trading of the Notes that are linked to the Index should not unduly impact the market for the underlying securities comprising the Index or raise manipulative concerns. As discussed more fully above, the underlying stocks comprising the Index are well-capitalized, highly liquid stocks. Moreover, the issuers of the underlying securities comprising the Index, are subject to reporting requirements under the Act, and all of the component stocks are either listed or traded on, or traded through the facilities of, U.S. securities markets. In addition, the Exchange equity margin rules and debt trading rules will apply to the securities. The Commission believes that the application of these rules should strengthen the integrity of the Notes. The Commission also believes that the Exchange has appropriate surveillance procedures in place to detect and deter potential manipulation for similar index-linked products. By applying these procedures to the Notes, the Commission believes that the potential for manipulation of the underlying securities is minimal, thereby protecting investors and the public interest.

Furthermore, the Commission notes that the Notes are dependant upon the individual credit of the issuer, UBS. To some extent this credit risk is minimized by the Exchange's listing standards in Section 107A of the *Company Guide* which provide that only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In any event, financial information regarding UBS, in addition to the information on the 500 common stocks comprising the Index, will be publicly available.[19]

The Commission also has a systemic concern, however, that a broker-dealer such as UBS, or a subsidiary providing a hedge for the issuer, will incur position exposure. However, as the Commission has concluded in previous approval orders for other hybrid instruments issued by broker-dealers,[20] the Commission believes that this concern is minimal given the size of the Notes issuance [21] in relation to the net worth of UBS.

Finally, the Commission notes that the value of the Index will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**. The Exchange has requested accelerated approval because this product is similar to several other instruments currently listed and traded on the Amex.[22] The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Additionally, the Notes will be listed pursuant to Amex's existing hybrid security listing standards as described above. Based on the above, the Commission believes there is good cause, consistent with Section 6(b)(5) and 19(b)(2) of the Act,[23] to approve the proposal on an accelerated basis.

[19] The Commission notes that the 500 component stocks that comprise the Index are reporting companies under the Act, and the Notes will be registered under Section 12 of the Act.

[20] *See* Securities Exchange Act Release Nos. 47983 (June 4, 2003), 68 FR 5032 (June 11, 2003) (SR–Amex–2003–45) (approving the listing and trading of notes whose returns are based on the performance of the Index); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (SR–Amex–2003–46) (approving the listing and trading of notes whose returns are based on the performance of the Index); 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (SR–NASD–2001–73) (approving the listing and trading of notes whose return is based on the performance of the Nasdaq–100 Index); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (SR–Amex–2001–40) (approving the listing and trading of notes whose return is based on a portfolio of 20 securities selected from the Amex Institutional Index); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (SR–Amex–96–27) (approving the listing and trading of notes whose return is based on a weighted portfolio of healthcare/biotechnology industry securities).

[21] The Commission notes that the issuance will be $10 million. Telephone conversation between Jeffery P. Burns, Associate General Counsel, Amex and Tim Fox, Attorney, Commission on July 7, 2003.

[22] *See supra* note 17.

[23] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–Amex–2003–62), is hereby approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[25]

Margaret H. McFarland,

Deputy Secretary.

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[24] 15 U.S.C. 78s(b)(2).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48151; File No. SR–Amex–2003–63]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to the Listing and Trading of Notes Linked to the Performance of the Amex Biotechnology Index

July 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934(''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 17, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange.

[1] 15 U.S.C. 78s(b)(l).

[2] 17 CFR 240.19b–4.

On June 23, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade under section 107A of the Amex Company Guide (''Company Guide''), notes linked to the performance of the Amex Biotechnology Index (the ''Biotech Index'' or Index'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under section 107A of the Company Guide, the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[4] The Amex proposes to list for trading under section 107A of the Company Guide notes, the performance of which is linked to the Biotech Index (the ''Accelerated Return Notes'' or ''Notes'').[5] The Biotech Index is determined, calculated and maintained solely by the Amex.[6] The Notes will provide for a multiplier of any positive performance of the Index during such term subject to a maximum payment amount or ceiling.

The Notes will conform to the listing guidelines under section 107A[7] and continued listing guidelines under sections 1001–1003[8] of the Company Guide. The Notes are senior non-convertible debt securities of Merrill Lynch. The Notes will have a term of not less than one, nor more than ten years. Merrill Lynch will issue the Notes in denominations of whole units (a ''Unit''), with each Unit representing a single Note. The original public offering price will be $10 per Unit. The Notes will entitle the owner at maturity to receive an amount based upon the percentage change of the Biotech Index. At maturity, if the value of the Index has increased over the term of the Notes, a beneficial owner will be entitled to receive a payment on the Notes equal to three (3) times the amount of that percentage increase, not to exceed a maximum payment (the ''Capped Value'') to be determined at the time of issuance of the Notes.[9] The Notes will not have a minimum principal amount that will be repaid, and accordingly, payment on the Notes prior to or at maturity may be less than the original issue price of the Notes. Accordingly, the Notes are not ''principal protected,'' and are fully exposed to any decline in the level of the Biotech Index.[10] The Notes are also not callable by the Issuer.

The payment that a holder or investor of a Note will be entitled to receive (the ''Redemption Amount'') depends entirely on the relation of the average of the values of the Biotech Index at the close of the market on the five (5) business days shortly before the maturity of the Notes (the ''Ending Value'') and the closing value of the Biotech Index on the date the Notes are priced for initial sale to the public (the ''Starting Value'').

If the Ending Value is greater than the Starting Value, the Redemption Amount per Unit will equal:

$$\$1{,}000 + \left[\$1{,}000 \times \left(\frac{\text{Final Level} - \text{Initial Level}}{\text{Initial Level}}\right)\right], \text{ subject to the Maximum Return Amount.}$$

[3] *See* Letter from Jeffrey P. Burns, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated June 20, 2003 (''Amendment No. 1''). In Amendment No. 1, the Exchange clarified its policy regarding the use of non-public information by employees. Employees involved in the selection and maintenance of the index are part of the marketing staff and are also covered by the insider trading prohibitions. Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Mia C. Zur, Attorney, Division of Market Regulation, Commission, on July 7, 2003.

[4] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR–Amex–89–29).

[5] Merrill Lynch & Co., Inc. (''Merrill Lynch'') and the Amex have entered into a non-exclusive license agreement providing for the use of the Index by Merrill Lynch and certain affiliates and subsidiaries in connection with certain securities including these Notes. Amex is not responsible and will not participate in the issuance and creation of the Notes.

[6] The Biotech Index is an equal dollar weighted index designed to measure the performance of a cross section of companies in the biotechnology industry that are primarily involved in the use of biological processes to develop products or provide services. Such processes include, but are not limited to, recombinant DNA technology, molecular biology, genetic engineering, monoclonal antibody-based technology, lipid/liposome technology, and genomics. The Index was established with a benchmark value of 200.00 on October 18, 1991. The Index is rebalanced quarterly based on closing prices on the third Friday in January, April, July & October to ensure that each component stock continues to represent approximately equal weight in the Index. The securities included in the Biotech Index are listed on the Amex, New York Stock Exchange, Inc. (''NYSE'') or traded through the Nasdaq Stock Market, Inc. (''Nasdaq'').

[7] The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) a minimum of 400 shareholders; (3) a market value of at least $4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer have assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[8] The Exchange's continued listing guidelines are set forth in sections 1001 through 1003 of Part 10 to the Exchange's Company Guide. section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in Section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.

[9] The capped value is expected to represent an appreciation of 16% to 20% over the original public offering price of the Notes. Thus, maximum payment is not expected to exceed between $11.60 and $12.00 per Note. *See* Merrill Lynch & Co., Inc., Accelerated Return Notes Linked to the Amex Biotechnology Index℠, Preliminary Prospectus Supplement dated June 16, 2003.

[10] A negative return of the Index will reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment.

If the Ending Value is less than or equal to the Starting Value, the Redemption Amount per Unit will equal:

$$\$1{,}000 + \left[\$1{,}000 \times \left(\frac{\text{Final Level} - \text{Initial Level}}{\text{Initial Level}} + 20\%\right)\right]$$

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments or any other ownership right or interest in the portfolio of securities comprising the Biotech Index. The Notes are designed for investors who want to participate or gain exposure to the Biotech Index, subject to a cap, and who are willing to forego market interest payments on the Notes during such term. The Commission has previously approved the listing of options, and securities the performance of which have been linked to, or based on, the Biotech Index.[11]

As of June 12, 2003, the market capitalization of the securities included in the Biotech Index ranged from a high of $84.1 billion to a low of $556.2 million. The average daily trading volume for these same securities for the last six (6) months, as of the same date, ranged from a high of 11.6 million shares to a low of 349,268 shares.[12] The value of the Biotech Index will be disseminated at least once every fifteen (15) seconds throughout the trading day.

Because the Notes are linked to an index comprised of equity securities, the Amex's existing equity floor trading rules will apply to the trading of the Notes. First, pursuant to Amex Rule 411, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.[13] Second, the Notes will be subject to the equity margin rules of the Exchange.[14] Third, the Exchange will, prior to trading the Notes, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the Notes and highlighting the special risks and characteristics of the Notes. With respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction. In addition, Merrill Lynch will deliver a prospectus in connection with the initial sales of the Notes.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, the Exchange will rely on its existing surveillance procedures governing equities, which have been deemed adequate under the Act. In addition, the Exchange also has a general policy, which prohibits the distribution of material, non-public information by its employees.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act[15] in general, and furthers the objectives of section 6(b)(5),[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR–Amex–2003–63 and should be submitted by August 7, 2003.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange, and, in particular, with the requirements of section 6(b)(5) of the Act.[17] The Commission finds that this proposal is similar to several approved instruments

[11] *See* Securities Exchange Act Release Nos. 31245 (September 28, 1992), 57 FR 45844 (October 5, 1992) (approving the listing and trading of long-term options (''LEAPS'') based on the Amex Biotechnology Index and a reduced value Amex Biotechnology Index); and 45305 (January 17, 2002), 67 FR 3753 (January 25, 2002) (approving the listing and trading of non-principal protected exchangeable notes linked to the Biotech-Pharmaceutical Index).

[12] As of June 12, 2003 the Biotech Index was composed of shares of the following companies: Affymetrix, Inc. (AFFX); Amgen Inc. (AMGN); Applera Corporation—Celera Genomics Group (CRA); Biogen, Inc. (BGEN); Cephalon, Inc. (CEPH); Chiron Corporation (CHIR); Enzon, Inc. (ENZN); Genentech, Inc. (DNA); Genzyme Corporation (GENZ); Gilead Sciences, Inc. (GILD); Human Genome Sciences, Inc. (HGSI); IDEC Pharmaceuticals Corporation (IDPH); Invitrogen Corporation (IVGN); Medimmune, Inc. (MEDI); Millennium Pharmaceuticals, Inc. (MLNM); Protein Design Labs, Inc. (PDLI) and Vertex Pharmaceuticals Incorporated (VRTX).

[13] Amex Rule 411 requires that every member, member firm or member corporation use due diligence to learn the essential facts, relative to every customer and to every order or account accepted.

[14] *See* Amex Rule 462.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(5).

currently listed and traded on the Amex.[18] Accordingly, the Commission finds that the listing and trading of the Notes based on the Index is consistent with the Act and will promote, among other things, just and equitable principles of trade and will facilitate transactions in securities, and, in general, protect investors and the public interest consistent with section 6(b)(5) of the Act.[19]

As described more fully above, at maturity, the holder of a Note will receive an amount based upon the percentage change of the Biotech Index. Specifically, at maturity, the holder of a Note will be entitled to receive a payment equal to three times the amount of that percentage increase, not to exceed a certain maximum payment, if the value of the Biotech Index has increased over the term of such Note. The Notes will provide investors who are willing to forego market interest payments during the term of the Notes with a means to participate or gain exposure to the Index, subject to a cap.

The Commission notes that the Notes are not-leveraged, non-principal protected instruments. The Notes are debt instruments whose price will be derived and based upon the value of the Biotech Index. The Notes do not have a minimum principal amount that will be repaid at maturity, and the payments of the Notes prior to or at maturity may be less than the original issue price of the Notes. Thus, if the value of the Biotech Index has declined at maturity, the holder of the Note will receive less than the original public offering price of the Note. Accordingly, the level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Because the final rate of return of the Notes is derivatively priced and based upon the performance of an index of securities, because the Notes are debt instruments that do not guarantee a return of principal, and because investors' potential return is limited by the Capped Amount, if the value of the Biotech Index has increased over the term of such Note, there are several issues regarding the trading of this type of product. However, for the reasons discussed below, the Commission believes that the Exchange's proposal adequately addresses the concerns raised by this type of product.

The Commission notes that the Exchange's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the Notes. In particular, by imposing the hybrid listing standards, suitability, disclosure, and compliance requirements noted above, the Commission believes that the Exchange has addressed adequately the potential problems that could arise from the hybrid nature of the Notes. Moreover, the Commission notes that the Exchange will distribute a circular to its membership calling attention to the specific risks associated with the Notes. The Commission also notes that Merrill Lynch will deliver a prospectus in connection with the initial sale of the Notes. In addition, the Commission notes that Amex will incorporate and rely upon its existing surveillance procedure governing equities, which have been deemed adequate under the Act. Moreover, the Commission also notes that the Exchange has a general policy that prohibits the distribution of material, non-public information by its employees, which is necessary given Amex's role in selecting components and maintaining the Index.

In approving this product, the Commission recognizes, that Biotech Index is an equal dollar weighted index listed on Nasdaq, the NYSE and the Amex. The Commission notes that the Biotech Index is determined, calculated, and maintained by Amex. As of June 12, 2003, the market capitalization of the securities included in the Biotech Index ranged from a high of $84.1 billion to a low of $556.2 million. The average daily trading volume for these same securities for the last six (6) months, as of the same date, ranged from a high of 11.6 million shares to a low of 349,268 shares.[20]

Given the relatively large trading volume and capitalization of the compositions of the stocks underlying the Biotech Index, the Commission believes that the listing and trading of the Notes that are linked to the Biotech Index, should not unduly impact the market for the underlying securities comprising the Biotech Index or raise manipulative concerns. As discussed more fully above, the underlying stocks comprising the Biotech Index are well-capitalized, highly liquid stocks. Moreover, the issuers of the underlying securities comprising the Biotech Index, are subject to reporting requirements under the Act, and all of the component stocks are either listed or traded on, or traded through the facilities of, U.S. securities markets. Additionally, the Amex's surveillance procedures will serve to deter as well as detect any potential manipulation.

Furthermore, the Commission notes that the Notes are depending upon the individual credit of the Issuer, Merrill Lynch. To some extent this credit risk is minimized by the Exchange's listing standards in section 107A of the Company Guide which provide the only issuers satisfying substantial asset and equity requirements may issues securities such as the Notes. In addition, the Exchange's ''Other Securities'' listing standards further require that the Notes have a market value of at least $4 million.[21] Furthermore, financial information regarding Merrill Lynch, in addition to the information on the common stocks comprising the Biotech Index, will be publicly available.[22]

The Commission also has a systemic concern, however, that a broker-dealer such as Merrill Lynch, or a subsidiary providing a hedge for the issuer will incur position exposure. However, as the Commission has concluded in previous approval orders for other hybrid instruments issued by broker-dealers,[23] the Commission believes that this concern is minimal given the size

[18] *See* Securities Exchange Act Release Nos. 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of non-principal protected notes linked to the S&P 500); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of non-principal protected notes linked to the S&P 500); 46883 (November 21, 2002), 67 FR 71216 (November 29, 2002) (approving the listing and trading of non-principal protected notes linked to the DJIA); and 45305 (January 17, 2002), 67 FR 3753 (January 25, 2002) (approving the listing and trading of non-principal protected exchangeable notes linked to the Biotech-Pharmaceutical Index).

[19] 15 U.S.C. 78f(b)(5). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] As of June 12, 2003 the Biotech Index was composed of shares of the following companies: Affymetrix, Inc. (AFFX); Amgen Inc. (AMGN); Applera Corporation-Celera Genomics Group (CRA); Biogen, Inc. (BGEN); Cephalon, Inc. (CEPH); Chiron Corporation (CHIR); Enzon, Inc. (ENZN); Genentech, Inc. (DNA); Genzyme Corporation (GENZ); Gilead Sciences, Inc. (GILD); Human Genome Sciences, Inc. (HGSI); IDEC Pharmaceuticals Corporation (IDPH); Invitrogen Corporation (IVGN); Medimmune, Inc. (MEDI); Millennium Pharmaceuticals, Inc. (MLNM); Protein Design Labs, Inc. (PDLI) and Vertex Pharmaceuticals Incorporated (VRTX).

[21] *See* Company Guide Section 107A.

[22] The Commission notes that the component stocks that comprise the Biotech Index are reporting companies under the Act, and the Notes will be registered under section 12 of the Act.

[23] *See* Securities Exchange Act Release Nos. 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (order approving the listing and trading of notes whose return is based on the performance of the Nasdaq-100 Index) (File No. SR–NASD–2001–73); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (order approving the listing and trading of notes whose return is based on a portfolio of 20 securities selected from the Amex Institutional Index) (File No. SR–Amex–2001–40); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (order approving the listing and trading of notes whose return is based on a weighted portfolio of healthcare/biotechnology industry securities) (File No. SR–Amex–96–27).

of the Notes issuance [24] in relation to the net worth of Merrill Lynch.

Finally, the Commission notes that the value of the Biotech Index will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Biotech Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register.** The Exchange has requested accelerated approval because this product is similar to several other instruments currently listed and traded on the Amex.[25]

The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Additionally, the Notes will be listed pursuant to Amex's existing hybrid security listing standards as described above. Based on the above, the Commission believes there is good cause, consistent with section 6(b)(5) and 19(b)(2) of the Act,[26] to approve the proposal, as amended, on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[27] that the proposed rule change (SR–Amex–2003–63), as amended, is hereby approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[28]

Margaret H. McFarland,

Deputy Secretary.

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[24] The Commission notes that the issuance is $10 million. *See* Merrill Lynch & Co., Inc., Accelerated Return Notes Linked to the Amex Biotechnology Index SM, Preliminary Prospectus Supplement dated June 16, 2003.

[25] *See* supra note 17.

[26] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(A)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48145; File No. SR–DTC–2003–03]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Modifications to Settlement Progress Payments Procedures

July 9, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on February 13, 2003, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (File No. SR–DTC–2003–03) described in Items I, II, and III below, which Items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will modify DTC's settlement progress payment (''SPP'') procedures to allow DTC participants, including issuing/paying agents (''IPAs''), to direct that the proceeds from a specific SPP be used to fund a particular transaction, including the maturity presentments of maturing securities from a particular money market instrument (''MMI'') program.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[2]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Recently, DTC and the Bond Market Association (''BMA'') sought industry comment on a series of possible revisions to DTC's MMI settlement system that were designed to enhance efficiency and reduce the liquidity risk that IPAs incur when making daily payments of billions of dollars on maturing MMIs.[3] Among the several problems that were identified, one is that the intraday funds paid by one commercial paper issuer may be used to pay off the maturity presentments of another issuer because IPAs cannot control how their issuers' obligations are processed against their accounts and because IPAs cannot align specific issuer intraday credits from the issuance of new commercial paper to a specific debt due to that same issuer's maturing commercial paper. Although this typically does not cause any problems because all obligations are settled, events such as those of September 11, 2001, can severely disrupt the process.

Under DTC's current procedures for processing of maturity presentments, DTC delivers the maturing commercial paper from the accounts of participants having positions in the maturing instrument to the IPA's MMI participant account early on the maturity date (generally around 2:00 a.m.). Since maturity presentments are processed as the equivalent of book-entry deliveries versus payment, a maturity presentment may recycle (*i.e.* may pend in DTC's system) just as any delivery would if the net debit cap or collateralization controls applicable to the IPA's account prevent the delivery from taking place. In such a situation, the maturity presentment would be processed only when additional funds are credited to the IPA's account. Recycling maturity presentments are processed in the order they are in DTC's recycling queue. This order is without regard to any offsetting payment or reissuance transaction because, as mentioned above, there is no provision in DTC's current procedures that enables an IPA to allocate settlement credits derived from an intraday SPP to a specific issuer's maturity presentment.

DTC's new procedures will enable the IPA to direct settlement credits from an intraday SPP to a specific issuer's maturity presentments. To do so, when an IPA wires funds to DTC's account at the Federal Reserve Bank of New York, the IPA will designate the CUSIP number of the issuer's MMI. DTC will use this information to process recycling transactions containing the designated CUSIP. (Previously, upon receipt of an intraday SPP, DTC would process the

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by NSCC.

[3] While DTC's filing focuses on commercial paper, the issues and revised procedures are for all instruments settled through the MMI settlement system.

first transaction in the IPA's recycling queue.)

DTC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [4] because it will promote the prompt and accurate settlement of securities transactions and will be implemented in a manner that is consistent with DTC's risk management controls.

B. Self-Regulatory Organization's Statement on Burden on Competition

DTC perceives no impact on competition by reason of the proposed rule change.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The proposed rule change was developed in consultation with participants in the MMI market and was one of the recommendations in a paper issued jointly by The Bond Market Association and The Depository Trust & Clearing Corporation, DTC's parent, on November 25, 2002. In addition, DTC's participants were notified by Important Notice B#4528 on March 31, 2003, about the modifications to DTC's SPP procedures.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) [5] of the Act and Securities Exchange Act Rule 19b–4(f)(4) [6] because it effects a change in an existing service of DTC that does not adversely affect the safeguarding of securities or funds in DTC's control or for which DTC is responsible and does not significantly affect DTC's or its participants' respective rights or obligations. At any time within 60 days of the filing of such proposed rule change, the commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549–0069. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–DTC–2003–03. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the rule filing that are filed with the Commission, and all written communications relating to the rule filing between the Commission and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at DTC's principal office. All submissions should refer to File No. SR–DTC–2003–03 and should be submitted within August 7, 2003.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

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[4] 15 U.S.C. 78q–1.

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(4).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48157; File No. SR–ISE–2003–14]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments No. 1 and 2 by International Securities Exchange, Inc., Relating to Fee Changes

July 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 22, 2003, the International Securities Exchange, Inc. (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the ISE. On May 15, 2003, the ISE filed Amendment No. 1 to the proposed rule change.[3] On July 8, 2003, the ISE filed Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing changes to its Schedule of Fees in order to establish a fee for CLICK™ through Virtual Private Network (''VPN''), a new type of technical connection to the Exchange. The text of the proposed rule change is available at the Office of the Secretary, the ISE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The ISE has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose [5]

The Exchange is proposing changes to its Schedule of Fees in order to establish a fee for CLICK™ through VPN. A CLICK™ through VPN connection is available to Electronic Access Members (''EAMs'') of the Exchange. CLICK™ through VPN consists of CLICK™ (the same front-end, order entry application

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated May 14, 2003 (''Amendment No. 1''). In Amendment No. 1, the ISE clarified that the word CLICK represents a registered trademark, as opposed to a defined term, and that CLICK/Trade Review Terminal fees do not apply to CLICK through VPN.

[4] *See* letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division, Commission, dated July 3, 2003 (''Amendment No. 2''). In Amendment No. 2, the ISE revises and replaces the original description contained in the purpose section of the notice. In particular, the revised purpose section clarifies that CLICK through VPN is a different means of connecting to the Exchange's existing trading system. ISE also notes that no changes are necessary to the existing ISE surveillance and communication rules to accommodate this connection, or its trading system.

[5] *See* Amendment No. 2, *supra* note 4.

currently widely utilized by EAMs) running over a secure ''virtual private network'' over the Internet. CLICK™ through VPN was designed for EAMs that want a lower cost, lower bandwith connection to the Exchange than the traditional, dedicated network CLICK™ connection. The Exchange also envisions that EAMs will use CLICK™ through VPN as a back-up or disaster recovery connection to the Exchange. CLICK™ through VPN is merely a different means of connecting to the Exchange's existing system. It does not change the operation of the Exchange's existing system, and it does not require any change to the Exchange's surveillance or communications rules. As a result, the Exchange is proposing to establish a monthly fee of $200 per Terminal for CLICK™ through VPN. The purpose of the CLICK™ through VPN Fee is to cover the Exchange's costs in connection with maintaining the virtual private network.

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under section 6(b)(4) of the Act[6] that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Act,[7] and Rule 19b–4(f)(2)[8] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[9]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing will also be available for inspection and copying at the principal office of the ISE. All submissions should refer to the File No. ISE–2003–14 and should be submitted by August 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

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[6] 15 U.S.C. 78(f)(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 19b–4(f)(2).

[9] For the purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on July 8, 2003, the date ISE filed Amendment No. 2.

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48161; File No. SR–NASD–2003–57]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 to the Proposed Rule Change Relating to Revisions to the Uniform Application for Securities Industry Registration or Transfer (Form U–4) and Uniform Termination Notice for Securities Industry Registration (Form U–5)

July 10, 2003.

I. Introduction

On April 8, 2003, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change that would revise the Uniform Application for Securities Industry Registration or Transfer (''Form U–4'') and Uniform Termination Notice for Securities Industry Registration (''Form U–5'') to: (1) Add disclosure questions to the ''Regulatory Disciplinary Actions'' subsection of Section 14 (Disclosure Questions) of the Form U–4 to elicit information regarding events that might cause a person to be subject to a statutory disqualification as a result of additional categories of statutory disqualification in the Act created by passage of the Sarbanes-Oxley Act of 2002 (''Sarbanes-Oxley Act''); (2) add a Disclosure Reporting Page (''DRP'') and a question to the Form U–5 that parallels the Form U–4 DRP relating to terminations for cause; (3) streamline the language associated with questions on the Form U–4 relating to fingerprinting requirements; and (4) make certain technical, clarifying, and conforming changes to facilitate accurate reporting and filing.

On April 16, 2003, NASD submitted Amendment No. 1 to the proposed rule change.[3] On April 30, 2003, NASD

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated April 16, 2003 (''Amendment No. 1''). In Amendment No. 1, NASD stated that the rule filing

submitted Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on June 4, 2003.[5] The Commission received a comment on the proposal from the Association of Registration Management (''ARM'') on June 25, 2003.[6] The NASD responded to this comment by amending the filing on July 1, 2003.[7] The Commission received a second comment on June 26, 2003 [8] and the NASD responded to this comment on July 3, 2003.[9] This order approves the proposed rule change, as amended. In addition, the Commission is publishing notice to solicit comment on and is simultaneously approving, on an accelerated basis, Amendment No. 3 to the proposal.

II. Summary of Comments and Response to Comments

A. ARM Comment

As stated above, the Commission received the ARM Comment on the proposed rule change on June 25, 2003, in which ARM made two primary arguments. First, ARM asserted that the information being sought by the introduction of questions 14D(2)(a) and (b) on the Form U–4 is redundant of the information already being sought by existing question 14D on the Form U–4. Moreover, ARM argued that this addition of a new question would ''present a monumental task to [the securities] industry'' due to the sheer number of Form U–4 amendments that would be required. ARM noted its concern that, upon the introduction of the new question, ''every registered person in NASD's WebCRD database (approximately 650,000 individuals) would * * * immediately have an *incomplete* Form U–4 on file.'' Second, ARM argued that the expanded definition of statutorily disqualified person, contained in the Sarbanes-Oxley Act, extends to non-registered individuals as well as registered individuals. In order to capture non-registered persons (and decrease the administrative burden on member firms), ARM suggested an annual certification procedure in which broker-dealer employees would certify their answers to the proposed questions instead of adding the new questions to the Form U–4.

B. Amendment No. 3

NASD responded to the ARM comment through Amendment No. 3. In Amendment No. 3, NASD conceded that there is an overlap between the information elicited by current Question 14D and proposed Question 14D(2), but that the literal language of current Question 14D does not specifically require individuals to report final orders of the National Credit Union Administration (''NCUA'') or state credit union regulators. Further, NASD does not agree with ARM that it may be implied on the basis of the current Form U–4 definition of ''investment-related'' that such orders should be reported under current Question 14D. In light of the fact that the Sarbanes-Oxley Act created a new set of statutory disqualifications, NASD, representatives of other self-regulatory organizations, and state regulators (including representatives of the North American Securities Administrators Association (''NASAA'')), made a policy decision that, although Question 14D currently requires firms to report most events that may cause an individual to become statutorily disqualified under the Sarbanes-Oxley Act, the forms should be amended to require firms and individuals to report all such information (in response to questions that specifically track the language of the Sarbanes-Oxley Act) in a new question.

NASD disagreed with ARM's suggestion that, as an alternative to including these questions on the forms, NASD should adopt a rule that would require firms to have their employees certify annually their answers to the proposed questions. First, NASD stated that it does not believe that this approach would save time and effort, since it likely would require firms to establish a methodology for requesting and collecting this information on paper. Second, NASD noted its belief that firms and individuals should be required to report timely (rather than annually) all statutorily disqualifying events on the Forms, including statutorily disqualifying events pursuant to the Sarbanes-Oxley Act.

Also in Amendment No. 3, NASD provided an in depth discussion of how it intends to ease the administrative burden on firms with which the ARM Comment was concerned. The NASD noted that beginning July 14, 2003, it will implement procedures with respect to filing answers to proposed Question 14D(2).[10] NASD noted generally that a change to a disclosure question or the addition of a new disclosure question on Form U–4 requires the prompt filing of an amended Form U–4 only if a registered person is subject to an action or event that requires an affirmative response to the changed or new question or additional disclosure on detailed DRPs relating to the new or changed question. Firms making such amendments to Section 14 (Disclosure Questions) or any DRP also generally are required to complete Section 15D of the Form U–4 (the Individual/Applicant's Amendment Acknowledgment and Consent). If a registered person has not been the subject of an action or event that is elicited by a changed or new disclosure question, he or she need not answer the changed or new disclosure question until an amended Form U–4 filing is otherwise required (*e.g.*, with the filing of a change of address, a request for a new registration category or license, or any new or amended responses to the questions in Section 14 or related DRPs).

Further, the NASD elaborated that, with respect to the proposed new Question 14D(2), firms need to determine immediately whether their registered persons have been subject to an action that requires reporting under the new question. Firms then will be required to amend Forms U–4 to respond to Question 14D(2) promptly (*i.e.*, not later than 30 days from implementation of the new question or August 13, 2003). Registered persons will be required to amend their Form U–4 by August 13, 2003 only when a firm has determined that one of its registered persons must answer ''yes'' to any part of Question 14D(2). Firms must obtain a completed Form U–4 Section 15D (the Individual/Applicant's Amendment Acknowledgment and Consent) in such

would be effective on July 14, 2003, instead of June 30, 2003.

[4] *See* letter from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine England, Assistant Director, Division, Commission, dated April 29, 2003 (''Amendment No. 2''). In Amendment No. 2, NASD amended the filing to correct typographical errors on pages 51 of 100 and 68 of 100 of the filing. On page 51 of 100, the NASD added the following language to renumbered question 14D(1)(e): ''denied, suspended, or revoked your registration license or.'' On page 68 of 100, the NASD eliminated the word ''or'' before ''commodities exchange.''

[5] *See* Securities Exchange Act Release No. 47936 (May 28, 2003), 68 FR 33545.

[6] *See* letter from Mario Di Trapani, President, ARM, to Jonathan G. Katz, Secretary, Commission (June 24, 2003) (''ARM Comment'').

[7] *See* letter from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Assistant Director, Division, Commission (July 1, 2003) (''Amendment No. 3'') (The Commission notes that the NASD inadvertently numbered Amendment No. 3 as Amendment No. 1).

[8] *See* letter from Dan Jamieson (''Jamieson'') to Jonathan Katz, Secretary, Commission (June 26, 2003) (''Jamieson Comment'').

[9] *See* e-mail from Richard E. Pullano, Associate Vice President/Chief Counsel Registration & Disclosure, NASD, to Katherine A. England, Assistant Director, Division, Commission (July 3, 2003) (''NASD Response'').

[10] In addition, NASD will publish a Notice to Members explaining these procedures and publish these procedures on the NASD Web Site.

cases. These amendment filings must include completed DRP(s) covering the proceedings or action reported. Firms are required to maintain a copy, with original signatures, of these amendment filings.

While NASD noted its appreciation that this requirement places an administrative burden on firms, it stated the belief that the NASD has taken sufficient steps to mitigate the burden. First, as a practical matter, NASD stated that current Question 14D elicits virtually all information required by the Sarbanes-Oxley Act changes with the exception of NCUA and state credit union regulatory proceedings or actions. Consequently, according to NASD, registered persons already should have reported most information responsive to the Sarbanes-Oxley Act changes, with the exception of those proceedings or actions. While registered persons with affirmative answers to current Question 14D also may be required to report an affirmative answer to new Question 14D(2), a statistical review done by the NASD of information in the CRD system reflects that only about five percent of registered persons (approximately 3,600 individuals) have affirmative answers to current Question 14D. Moreover, based on preliminary discussions with the NCUA and state regulators, NASD noted its belief that the number of required amendment filings to report NCUA and state credit union regulatory proceedings/actions will be even smaller, involving less than one-tenth of one percent of registered persons. Thus, NASD attested that the number of Form U–4 amendments firms will be obligated to file to report affirmative answers to new Question 14D(2) by August 13, 2003 will be quite small. Firms will, however, be required to obtain Section 15D (the registered person's acknowledgement and consent), with original signatures, for these registered persons.

Moreover, in Amendment No. 3, NASD noted that any registered person who has not filed an amended Form U–4 reporting credit union regulatory proceedings within the specified 30-day period will be deemed to have represented that he or she has not been the subject of any such proceedings. Firms will be entitled to submit amended Forms U–4 on behalf of such registered persons without completing Section 15D, provided that the amended filing does not involve any other Section 14 Disclosure Question changes. Although firms will not be required to obtain an executed Section 15D from registered persons under these circumstances, the registered persons will be required to answer the new 14D(2) questions.[11] NASD cautioned that a registered person who fails timely to notify his or her member firm of a reportable credit union regulatory proceeding will be deemed to have made a false or incomplete filing, irrespective of whether his or her firm has made a specific inquiry of its registered persons about such proceedings. In addition, NASD emphasized that reporting such proceedings is an affirmative obligation of the registered person, which is not excused by a firm's failure specifically to inquire as to the existence of such proceedings.

Finally, NASD concluded in Amendment No. 3 that these procedures should avoid imposing on firms the unwarranted administrative burdens and costs associated with obtaining more than 600,000 copies of Form U–4 Section 15D with original signatures for registered persons who have no reportable credit union regulatory proceedings.

C. Jamieson Comment

The Jamieson Comment was received by the Commission on June 26, 2003 in which Jamieson made one primary argument that was germane to the NASD's proposed rule change. Specifically, Jamieson questioned the need and rationale for the proposal to add Question 7F to the Form U–5. That question would allow firms to report that an individual was terminated after allegations of certain violations, fraud, wrongful taking of property, or failure to supervise, and would further clarify the terminated individual's obligation to report the termination on the Form U–4 in response to current Question 14J thereon.

D. NASD Response

The Commission received the NASD Response to the Jamieson Comment on July 3, 2003. NASD noted in its response that the new question 7F on the Form U–5 does not change the reporting obligations of either a broker-dealer or a registered person. Instead, the new question parallels Form U–4, Question 14J, relating to terminations for cause and will provide a firm with a specific question to answer if it has terminated a registered person under the circumstances identified in the question.

NASD further argued that affirmative responses to proposed Question 7F should clarify for NASD staff and terminated individuals the specific basis for and circumstances surrounding the termination (and whether it requires an affirmative answer on the corresponding Form U–4 question). The new question also should enable firms to specifically identify and provide supporting details regarding certain categories of terminations for cause. Currently, NASD staff must rely on the reason for termination provided by the terminating firm, which may provide an adequate response regarding the reason for termination, but may not provide sufficient detail to allow staff or the terminated person to determine whether an affirmative response is required to Form U–4, Question 14J. Similarly, NASD stated that although current Question 7B on Form U–5 elicits information relating to an internal review conducted by a firm relating to certain violations, fraud, wrongful taking of property, or failure to supervise, an affirmative answer to that question reports only that a terminated person was under internal review for those particular circumstances or conduct either at the time of termination or after; it does not, however, specifically identify whether the registered person was terminated for the reasons specified in the question.

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change, the comments, and the NASD's responses thereto, and finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations

[11] The CRD system will process such Form U4 filings as follows. If a registered person has a ''yes'' answer to any question in Questions 14A through J in the Disclosure Section of the Form U–4 on or after July 14, the CRD system will require that the firm filing an amended Form U–4 enter a response (by selecting the appropriate ''yes'' or ''no'' radio button) to new disclosure Question 14D(2) and also obtain a completed Section 15D. If those questions are not answered, the filing will fail the CRD system completeness check. For the sake of clarity, NASD notes that an amendment to a Form U–4 filing on or after July 14, for the purpose of adding a ''yes'' answer to Questions 14A through J, when previously there had been no ''yes'' answers, would require the firm filing the amendment to answer new disclosure Question 14D(2) and obtain a completed Section 15D.

If a registered person does not have a ''yes'' answer to questions 14A through J in the Disclosure Section of the Form U4, the CRD system will default new disclosure Question 14D(2) with a ''no'' response for any filings prepared for submission after implementation of the new questions, and the firm will not be required to obtain a completed Section 15D for the purposes of answering Question 14D(2). Form U4 amendments filed by the firm for such individuals will not fail the completeness check due to these new questions; however, by submitting the filing, firms will be representing that they are filing ''no'' answers to the new questions, unless they affirmatively change the ''no'' answer to ''yes'' before submitting the filing. Similarly, as discussed above, registered persons who have not filed an amended Form U–4 reporting credit union regulatory proceedings within the specified 30-day period will be deemed to have represented that they have not been the subject of any such proceedings.

promulgated thereunder applicable to a national securities association,[12] and, in particular, with the requirements of Section 15A[13] of the Act. Specifically, the Commission finds that approval of the proposed rule change is consistent with Section 15A(b)(6)[14] of the Act because it is designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission finds that the proposed rule change, as amended, is reasonably designed to accomplish these ends by eliciting the reporting of events that may cause an individual to be subject to a statutory disqualification as that definition has been expanded by the Sarbanes-Oxley Act and, generally, making changes to the Forms U–4 and U–5 that should increase the accuracy and completeness of the information reported on the forms.

The Commission has carefully considered the relevant issues raised by ARM's and Jamieson's comments and is not persuaded by their arguments. With respect to the concerns raised in the ARM Comment, the Commission believes that the NASD has sufficiently responded through Amendment No. 3. Specifically, the Commission believes that the policy decision made in connection with the adoption of proposed Questions 14D(2)(a) and (b) to the Form U–4 was appropriate. In spite of the fact that certain overlap may exist between proposed Questions 14D(1) and 14D(2), the Commission agrees that the creation of a new set of statutory disqualifications by the U.S. Congress through the Sarbanes-Oxley Act is significant and warrants an additional question on the Form U–4 to assure accurate and complete reporting. Likewise, the Commission believes that an annual certification process would not be appropriate in this case.

In addition, the Commission believes that Amendment No. 3, regarding the implementation of the proposed rule change, proposes a fair and reasonable balance between the administrative burden that will be imposed upon member firms and the benefit that the proposed rule change will produce. The NASD's estimates with respect to the relatively low number of firms and representatives that will likely be affected by the new questions to be persuasive.

The Commission believes that the NASD has addressed the concerns raised in the Jamieson Comment. The Commission believes it is important for NASD staff and terminated individuals to be able to determine the specific basis for and circumstances surrounding the termination (and whether it requires an affirmative answer on the corresponding Form U–4 question). The Commission also considers it significant that, although current Question 7B on Form U–5 elicits information relating to an internal review conducted by a firm, it does not specifically identify whether the registered person was terminated for the reasons specified in the question. Proposed Question 7F should provide this information.

Finally, the Commission, pursuant to Section 19(b)(2)[15] of the Act, finds good cause for approving Amendment No. 3 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register.** As discussed above, the Commission believes that the NASD has responded to the concerns raised in the ARM Comment and has struck a fair and reasonable balance between the burden that the proposed rule change will impose upon member firms and the benefit that the proposed rule change will produce. In addition, the Commission notes that granting accelerated approval to Amendment No. 3 will facilitate the timely implementation of the proposed rule change and facilitate the NASD's meeting the pre-scheduled CRD systems change implementation date for these forms changes.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether the amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–57 and should be submitted by August 7, 2003.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR–NASD–2003–57), as modified by Amendment Nos. 1 and 2, be, and it hereby are, approved, and that Amendment No. 3 be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18065 Filed 7–16–03; 8:45 am]

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[12] 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78o–3.

[14] 15 U.S.C. 78o–3(b)(6).

[15] 15 U.S.C. 78s(b)(2).

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–2(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48159; File No. SR–NYSE–2002–64]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Amend the Interpretation of NYSE Rule 345A (''Continuing Education for Registered Persons'')

July 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 16, 2002, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On June 11, 2003, the NYSE filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed Interpretation of NYSE Rule 345A (''Continuing Education for Registered Persons'') would require registered persons to complete a Firm Element Continuing Education Program, prior to December 31, 2006, or pass a qualification exam module prior to selling security futures contracts or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

supervising such activity. The text of the proposed rule change is available at the Office of the Secretary, the NYSE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commodity Futures Modernization Act of 2000 permits the trading of security futures, subject to joint regulation by the Commission and the Commodity Futures Trading Commission. Since security futures contracts are new and unfamiliar to a majority of securities-registered persons, the Exchange, in coordination with other securities and futures self-regulatory organizations (''SROs''), is in the process of developing regulatory requirements for the registration and qualification of persons engaged in security futures contracts sales and supervision activities.

In order to engage in securities sales activity, a person must be registered and qualified as a General Securities Registered Representative (Series 7 Examination). Supervision of such activity requires registration and qualification as a General Securities Sales Supervisor (Series 9/10 Examination) or by way of another examination acceptable to the Exchange (*e.g.,* the Series 24 Examination).

These qualification examinations do not, however, cover security futures contracts in sufficient depth or detail to provide an adequate level of competence for registrants who wish to effect transactions or supervise such transactions in the security futures market. A qualification examination specific to security futures is currently under development by the SROs. In the interim, staff of the SROs and the Commission have agreed upon an industry-wide requirement that completion of a prescribed continuing education program be prerequisite to the sale or supervision of security futures contracts.

Consistent with this initiative, the Exchange proposes an Interpretation to NYSE Rule 345A that would require completion of a Firm Element continuing education program, prior to December 31, 2006, as a prerequisite to either selling security futures contracts or supervising such activity. The Interpretation would require the program to impart sufficient knowledge of, and proficiency in, security futures contracts to enable the responsible conduct of assigned functions.

The program would be subject to the standard Firm Element requirements prescribed in NYSE Rule 345A, including a needs analysis, a content outline, and documentation of participants who attend and complete the program. Prescribed subject area coverage is provided in a Content Outline developed by the Exchange.

Upon the implementation of a Security Futures Contracts qualification examination module, persons not already qualified as General Securities Registered Representatives must pass the qualification examination module in order to engage in or supervise Security Futures Contracts activity. Persons qualified as General Securities Registered Representatives prior to the time such qualification examination module is implemented may, prior to December 31, 2006, complete an appropriate Firm Element continuing education program in lieu of passing the qualification examination.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of section 6(c)(3)(A) [3] of the Act. Under that section, it is the Exchange's responsibility to prescribe standards of training, experience and competence for persons associated with Exchange members and member organizations.

In addition, the Exchange believes that under section 6(c)(3)(B) of the Act,[4] the Exchange may bar a natural person from becoming a member or person associated with a member or member organization if such natural person does not meet such standards of training, experience and competence as are prescribed by the rules of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to the File No. SR–NYSE–2002–64 and should be submitted by August 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18127 Filed 7–16–03; 8:45 am]

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[3] 15 U.S.C. 78f(c)(3)(A)(i).

[4] 15 U.S.C. 78f(c)(3)(B)(i).

[5] 17 CFR 200.30–(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48158; File No. SR–PCX–2003–17]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to the Exchange's Rules Under the Minor Rule Plan

July 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 15, 2003, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On June 6, 2003, the PCX filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change was submitted in response to the Order Instituting Public Administrative Proceedings Pursuant to section 19(h)(1) of the Act, Making Findings and Imposing Remedial Sanctions.[3] Pursuant to the Order, the Exchange filed a proposed rule change to adopt new Sanctioning Guidelines for order handling rules which included late trade reporting.[4] At that time, the Exchange stated that it intended to amend its Minor Rule Plan (''MRP'') to increase the sanctions for late trade reporting violations. The Exchange believes that an increase in sanctions is necessary to deter violations of its trade reporting rule. Accordingly, the PCX is proposing to amend the Recommended Fine Schedule (''RFS'') of the MRP in order to increase the fines for Late Trade Reporting violations pursuant to PCX Rule 6.69(a). The text of the proposed rule change is below. Proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

Minor Rule Plan

Rule 10.13

(a)–(j)—No change.

(k)(i) Minor Rule Plan: Recommended Fine Schedule

1–37—No change.

38. Late reporting of trades without reasonable justification or excuse (Rule 6.69(a)).

1st Violation $[100] *250*
2nd Violation $[250] *500*
3rd Violation $[500] *1,000*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the RFS (PCX Rule 10.13(k)(i)(38)) of the MRP in order to increase the fines for Late Trade Reporting violations. PCX Rule 6.69(a) states that all members and member organizations, who are required to report trades either directly to the Options Price Reporting Authority (''OPRA'') or to another party responsible for reporting trades to OPRA, shall report the transaction immediately upon execution, which means no later than 90 seconds following execution of the trade.

The purpose of the proposed rule change is based on the following: first, the PCX believes that the current fines are inconsistent with the vast majority of fines that are subject to the MRP. Second, the PCX believes that an increase in the current fines will more adequately sanction and deter violations of late trade reporting. Under the proposed increase, late trade reporting will be fined $250 for a first violation, $500 for a second, and $1,000 for a third, calculated on a two-year basis.

The Exchange believes that the adoption of the proposed rule change will serve to significantly strengthen the ability of the Exchange to carry out its oversight responsibilities as a self-regulatory organization. The rule should also aid the Exchange in carrying out its surveillance and enforcement functions. Under the proposed rule change, the Enforcement Department would continue to exercise its discretion under PCX Rule 10.13(f) and take cases out of the MRP to pursue them as formal disciplinary matters if the facts or circumstances warrant such action.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act,[5] in general, and section 6(b)(5) of the Act,[6] in particular, in that it will promote just and equitable principles of trade; facilitate transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system; and protect investors and the public interest. The Exchange believes that the proposal is also consistent with section 6(b)(6) of the Act,[7] which requires that members and persons associated with members be appropriately disciplined for violations of Exchange rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43268 (September 11, 2000) (File No. 3–10282).

[4] *See* Securities Exchange Act Release No. 45416 (February 7, 2002), 67 FR 6777.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to file number SR–PCX–2003–17 and should be submitted by August 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18128 Filed 7–16–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34–48166; File No. SR–Phlx–2002–87)

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Philadelphia Stock Exchange, Inc. and Amendment No. 1 Thereto Relating to the Imposition of a 500 Contract Cap on Payment for Order Flow Fees

July 11, 2003.

On December 26, 2002, pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] the Philadelphia Stock Exchange, Inc. (''Phlx'') filed with the Securities and Exchange Commission a proposal to impose a 500-contract cap on fees in connection with its payment for order flow program. On May 29, 2003, the Phlx filed Amendment No. 1 to the proposed rule change. Under the proposal, the applicable payment for order flow fee would be imposed only on the first 500 contracts per individual cleared side of a transaction.

The proposed rule change was published for comment in the **Federal Register** on June 6, 2003.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, particularly section 6(b) of the Act[4] and the rules and regulations thereunder.[5] The Commission finds that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among Phlx members and other persons using the Phlx's facilities, consistent with Section 6(b)(4) of the Act.[6]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–Phlx–2002–87) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18123 Filed 7–16–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48163; File No. SR–Phlx–2003–46]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to an Extension of Interpretation of PACE Guarantees in Securities Subject to ITS Plan Exemption

July 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4[2] thereunder, notice is hereby given that on June 26, 2003, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval.

The proposal is intended to coincide with the Commission's extension of a *de minimis* exemption from the trade-through provisions of the Intermarket Trading System (''ITS'') Plan with respect to certain transactions in the Nasdaq-100 Index (''QQQs''), the Dow Jones Industrial Average (''DIAMONDs''), and the Standard & Poor's 500 Index (''SPDRs'').[3] The Commission's original exemption expired on June 4, 2003. The Exchange Rule that mirrors the Commission's exemption similarly expired on June 4, 2003.[4] The Commission recently extended the effectiveness of the exemption to March 4, 2004.[5] In order to avoid a lapse in the effectiveness of the corresponding Exchange Rule, this order is approving the Exchange's proposal to extend the rule from June 5, 2003 until March 4, 2004.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to extend a limited exemption in transactions in certain exchange-traded fund (''ETFs'') shares from Supplementary Material Section .10(a)(iii) of Exchange Rule 229, Philadelphia Stock Exchange Automated Communication and Execution System (''PACE'') beyond June 4, 2003.[6] The text of the proposed rule change is available at the Office of the Secretary, Phlx and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 47958 (May 30, 2003), 68 FR 34026 (June 6, 2003).

[4] 15 U.S.C. 78f(b).

[5] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) at 56607 (''ITS Exemption Order'').

[4] *See* Securities Exchange Act Release No. 46761 (November 1, 2002), 67 FR 68222 (November 8, 2002)(order approving SR–Phlx–2002–49).

[5] *See* Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003)(order extending ITS Exemption Order).

[6] PACE is the Exchange's Automated Communication and Execution System. PACE provides a system for the automatic execution of orders on the Exchange equity floor under predetermined conditions.

the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the time period of a current limited exemption from Phlx Rule 229.10(a)(iii). The exemption applies to the ETFs tracking the QQQs, DIAMONDs and SPDRs,[7] and correlates with an exemption from the ITS Plan issued by the Commission (the ''ITS Exemption'').[8] The Commission's ITS Exemption exempted any transactions in the three ETFs that are effected at prices at or within three cents away from the best bid and offer quoted in the Consolidated Quote System from the trade-through provisions of the ITS Plan through June 4, 2003. On May 30, 2003, the Commission issued an order extending the ITS Exemption from June 4, 2003 through March 4, 2004.[9]

Phlx Rule 229.10(a)(iii) requires a Phlx specialist to execute certain orders that are traded-through by another market center. It provides generally that if 100 or more shares print through the limit price on any exchange(s) eligible to compose the PACE Quote[10] after the time of entry of any such order into PACE, the specialist shall execute all such orders at the limit price without waiting for an accumulation of 1000 shares to print at the limit price on the New York market.[11]

Prior to the Commission's issuance of the ITS Exemption, although the specialist had this obligation the specialist was, in turn, entitled to ''satisfaction'' of those orders pursuant to section 8(d) of the ITS Plan. Now, where trading through is no longer prohibited by the ITS Plan, as enumerated in the ITS Exemption, the specialist does not have recourse to seek ''satisfaction'' for these orders and is responsible for those executions. Moreover, the Exchange believes that the provision now unduly burdens the specialist by requiring the specialist to execute orders in situations where the specialist does not have access to trading at that price. Thus, the Phlx believes that its provision guaranteeing an execution no longer makes sense.

The corresponding limited exemption contained in the last sentence of Exchange Rule 229.10(a)(iii) was initially put in effect on a pilot basis for the period September 4, 2002 to October 4, 2002.[12] The pilot was subsequently extended to November 3, 2002.[13] Although Exchange Rule 229.10(a)(iii) was most recently revised to provide that its limited exemption shall be in effect ''for so long as the exemption granted by such Order remains in effect with respect to such exchange-traded funds,'' the Exchange stated in the proposed rule change adopting that language that ''[t]his exemption, which went into effect on September 4, 2002 and will remain in effect until June 4, 2003, allows Participants to execute transactions, through automatic execution or otherwise, without attempting to access the quotes of other Participants when the expected price improvement would not be significant.'' [14] (emphasis added)

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act [15] in general, and furthers the objectives of section 6(b)(5) of the Act [16] in particular, in that it is designed to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. By adopting the extension of the current exemption, the Exchange avoids burdening specialists with the obligation to fill an order in circumstances where an external event triggered the execution obligation and the specialist could not access trading at that price.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

[7] The Exchange does not currently trade DIAMONDs or SPDRs but may determine to do so in the future. The Exchange does trade QQQs. The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares℠, Nasdaq-100 Trust℠ , Nasdaq-100 Index Tracking Stock℠, and QQQ℠ are trademarks or service marks of The Nasdaq Stock Market, Inc. (''Nasdaq'') and have been licensed for use for certain purposes by the Phlx pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index® (the ''Index'') is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust℠, or the beneficial owners of Nasdaq-100 Shares℠. Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

[8] *See* note 3, *supra.*

[9] *See* note 5, *supra.*

[10] PACE Quote is defined in Phlx Rule 229 as the best bid/ask quote among the American Stock Exchange LLC, Boston Stock Exchange, Inc., Cincinnati Stock Exchange, Inc., Chicago Stock Exchange, Inc., New York Stock Exchange, Inc., Pacific Exchange, Inc. and the Phlx, or the Intermarket Trading System/Computer Assisted Execution System (''ITS/CAES'') quote, as appropriate.

[11] To be understood, Section .10(a)(iii) must be read in conjunction with the preceding section of the PACE Rule. Supplementary Material Section .10(a)(ii) provides as follows:

Non-Marketable Limit Orders—Unless the member organization entering orders otherwise elects, round-lot limit orders up to 500 shares and the round-lot portion of PRL limit orders up to 599 shares which are entered at a price different than the PACE Quote will be executed in sequence at the limit price when an accumulative volume of 1000 shares of the security named in the order prints at the limit price or better on the New York market after the time of entry of any such order into PACE. For each accumulation of 1000 shares which have been executed at the limit price on the New York market, the specialist shall execute a single limit order of a participant up to a maximum of 500 shares for each round-lot limit order up to 500 shares or the round-lot portion of a PRL limit order up to 599 shares.

[12] *See* Securities Exchange Act Release No. 46481 (September 10, 2002), 67 FR 58669 (September 17, 2002) (notice of immediate effectiveness of pilot for the period September 4, 2002 to October 4, 2002).

[13] *See* Securities Exchange Act Release No. 46615 (October 8, 2002), 67 FR 63723 (October 15, 2002) (notice of immediate effectiveness of extension of pilot to November 3, 2002).

[14] *See* note 4, *supra.*

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–2003–46 and should be submitted by August 7, 2003.

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule is consistent with the requirements of section 6(b)(5) of the Act [18] because it is designed to facilitate transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of the publication of notice thereof in the **Federal Register**, and for granting approval retroactively to June 5, 2003, the effective date of the Commission's extension of the ITS exemption. The Commission believes that by extending the Exchange's proposed exemption for its members, the Exchange removes the specialist's obligation to provide trade-through protection in situations where it will not be permitted to seek satisfaction through ITS from the primary market.

This obligation was one the Phlx assumed voluntarily in order to make its market more attractive to sources of order flow, not an obligation the Act imposes on a market. The Commission believes that the business decision to potentially forego order flow by no longer providing print protection is a judgment the Act allows the Phlx to make.[19]

[17] In approving this rule proposal, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(5).

[19] The Commission notes that the Phlx's proposed rule change will remain in effect only until the expiration of the extension of Commission's ITS Exemption Order on March 4, 2004.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[20] that the proposed rule change (SR–Phlx–2003–46) is approved on an accelerated basis and is effective retroactively to June 5, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18125 Filed 7–16–03; 8:45 am]

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[20] 15 U.S.C. 78f(b)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48160; File No. SR–Phlx–2003–15]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to the Prohibition Against Specialists Accepting Discretionary Orders on the Limit Order Book

July 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 13, 2003, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On June 5, 2003, the Phlx filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change has been submitted in response to the Order Instituting Public Administrative Proceedings Pursuant to section 19(h)(1) of the Act, Making Findings and Imposing Remedial Sanctions.[3] Specifically, the Phlx proposes to amend Option Floor Procedure Advice (''OFPA'') A–2, Types of Orders to be Accepted onto the Specialist's Book, to codify the prohibition against specialists accepting discretionary orders on the limit order book. The text of the proposed rule change is set forth below. Additions are italicized.

* * * * *

A–2 Types of Orders To Be Accepted onto the Specialist's Book

(i)–(iii) No change.

(iv) A Specialist shall not accept discretionary orders.

FINE SCHEDULE (Implemented on a Three-year Running Calendar Basis)

A–2

1st Occurrence—$250.00
2nd Occurrence—$500.00
3rd Occurrence—$1,000.00
4th Occurrence and Thereafter—
Sanction is discretionary with Business Conduct Committee

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, OFPA A–2 sets forth the types of orders that a specialist must accept, and the types of orders a specialist may not accept onto the limit order book.[4] OFPA A–2 provides that a specialist may refuse to accept contingency orders,[5] except that a

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43268 (September 11, 2000) (File No. 3–10282).

[4] The electronic ''limit order book'' is the Exchange's automated specialist limit order book, which automatically routes all unexecuted AUTOM orders to the book and displays orders real-time in order of price-time priority. Orders not delivered through AUTOM may also be entered onto the limit order book. *See* Phlx Rule 1080, Commentary .02.

[5] Phlx Rule 1066 (c) defines a contingency order as a limit or market order to buy or sell that is contingent upon a condition being satisfied while the order is at the post. The Rule lists the following types of contingency orders:

(i) Stop-Limit Order. A stop-limit order is a contingency order to buy or sell at a limited price when the market for a particular option contract reaches a specified price. A stop-limit order to buy becomes a limit order executable at the limit price or better when the option contract trades or ibid at

specialist may only refuse to accept customer contingency orders with the prior approval of two Floor Officials. Specialists must accept all non-contingent limit orders tendered for placement on the limit order book.[6]

The purpose of the proposed rule change is to amend OFPA A–2 specifically to prohibit a specialist from accepting discretionary orders[7] on the limit order book. The Exchange believes that this clarifying provision is consistent with the Act, in that a specialist is responsible to effect transactions on behalf of the accounts of the persons that have placed limit orders on the limit order book when such limit orders become marketable.[8] The Exchange believes that this proposed provision should provide Exchange specialists with more specific guidance as to the types of orders that they may, and may not, accept onto the limit order book by codifying a prohibition contained in the Act into Phlx rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b)[9] of the Act in general, and section 6(b)(5)[10] in particular in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and protect investors and the public interest by amending its rules to more closely track the provisions of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to file number SR–Phlx–2003–15 and should be submitted by August 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–18126 Filed 7–16–03; 8:45 am]

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or above the stop-limit price, after the offer is represented in the trading crowd. A stop-limit order to sell becomes a limit order executable at the limit price or better when the option contract trades or is offered at or below the stop-limit price, after the order is represented in the trading crowd.

(ii) Stop (stop-loss) Order. A stop order is a contingency order to buy or sell when the market for a particular option contract reaches a specified price. A stop order to buy becomes a market order when the option contract trades or is bid at or above the stop price, after the order is represented in the trading crowd. A stop order to sell becomes a market order when the option contract trades or is offered at or below the stop price, after the order is represented in the trading crowd.

(iii) Multi-Part Order. A multi-part order is an order to buy and/or sell a stated number of foreign currency option contracts and a stated number of foreign currency future contracts. A multi-part order may be executed in accordance with the procedures outlined in Phlx Rule 1068.

(iv) Delta Order. A ''delta order'' is a contingency order that is dependent upon the amount an option's price changes in relation to a corresponding change of price in the underlying security.

(v) All-or-None Order. An all-or-none order is a market or limit order which is to be executed in its entirety or not at all.

(vi) Opening-Only-Market Order. An opening-only-market order is a market order which is to be executed in whole or in part during the opening rotation of an options series or not at all.

(vii) Market-on-Close Order. A market-on-close order is a market limit order to be executed as close as possible to the closing bell, or during the closing rotation and should be near to or at the closing price for the particular series.

(viii) Cancel-Replacement Order. A cancel-replacement order is a contingency order consisting of two or more parts which require the immediate cancellation of a previously received order prior to the replacement of a new order with new terms and conditions. If the previously placed order is already filled partially or in its entirety the replacement order is automatically canceled or reduced by such member.

[6] *See* Securities Exchange Act Release No. 34721 (September 26, 1994), 59 FR 50310 (October 23, 1994) (SR-Phlx-92–03) (Order approving amendments to OFPA A–2 permitting specialists to accept contingency orders and reflecting that Exchange specialists are not permitted to accept discretionary orders, including spread, straddle, and combination orders).

[7] Section 3(a)(35) of the Act provides that a person exercises ''investment discretion'' with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and the rules and regulations thereunder. 15 U.S.C. 78c(35).

[8] Section 11(a)(1) of the Act prohibits any member of a national securities exchange from effecting any transaction on such exchange for its own account, the account of an associated person, *or an account with respect to which it or an associated person thereof exercises investment discretion.* 15 U.S.C. 78k(a)(1) (emphasis added). The Act provides an exception from this prohibition for any transaction by a dealer acting in the capacity of market maker. 15 U.S.C 78k(a)(1)(A). Furthermore, Section 11(b) of the Act provides that it shall be unlawful for a specialist permitted to act as a broker and dealer to effect on the exchange as broker any transaction except upon a market or limited price order. 15 U.S.C. 78k(b). In this situation, once the limit order is placed on the limit order book, the specialist becomes a ''broker'' by definition, engaged in the business of effecting transactions in securities for the account of others, is not acting in the capacity of market maker, and therefore does not qualify for the market maker exception to the prohibition. 15 U.S.C. 78c(4)(A).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 03–15651]

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of draft interpretations; request for comments.

SUMMARY: This notice sets forth two draft interpretations concerning how our standard on lamps, reflective devices, and associated equipment applies to replacement equipment. We will issue final interpretations after the comment period closes, and after considering any comments submitted.

DATES: You should submit comments early enough to ensure that Docket Management receives them not later than September 2, 2003.

ADDRESSES: You may submit comments (identified by the docket number set forth above) by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site. Please note, if you are submitting petitions electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.[1]
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and docket number. For detailed instructions on submitting comments, see the Submission of Comments heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Taylor Vinson, Office of Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC, 20590, Telephone: (202) 366–5263, Fax: (202) 366–3820.

SUPPLEMENTARY INFORMATION: One of the functions performed by NHTSA's Chief Counsel is to issue interpretations of the statutes administered by the agency and regulations issued by the agency under those statutes. *See* 49 CFR 501.8(d)(5). These interpretations are typically issued in the form of a letter responding to a request for interpretation from a manufacturer or other interested person. Our interpretations have always been placed in public viewing files and, more recently, have been available to the public on the web.

In reviewing how we handle interpretations, we believe that, in certain cases, particularly those involving important novel issues and potentially broad impacts, it would be beneficial to publish draft interpretations in the **Federal Register** to provide an opportunity for public comment before making these interpretations final. This will help ensure that we have considered all relevant issues prior to publishing a final interpretation.

We will provide a 45-day comment period. All timely comments will be considered before we publish a final interpretation.

Our interpretations include all relevant information necessary to understand the issues raised by the interpretation. Consequently, we generally will not publish the incoming request for interpretation. However, we will place the incoming request for interpretation in the docket, as background information.

In this notice, we are setting forth two draft interpretations concerning how our standard on lamps, reflective devices, and associated equipment applies to replacement equipment. They respond to two requests for interpretation submitted by Calcoast-ITL, a testing company.

Draft Interpretation No. 1

This replies to your letter requesting an interpretation of Federal Motor Vehicle Safety Standard No. 108, Lamps, reflective devices, and other associated equipment. You asked whether replacement lamps are required to have all the functions of original lamps. You also asked whether replacement lamps for the rear of a vehicle may have the reflex reflectors in a location that is inboard from that in the original lamps. We respond to your questions below.

You asked your questions in connection with replacement lamps for the rear of certain Honda Civics. The Honda Civics, as originally manufactured, include two lamps on each side of the rear of the vehicle, one lamp on the vehicle body and an adjacent one (inboard from the other lamp) on the decklid (back of the trunk). The lamps on the vehicle body include a reflex reflector.

You stated that you have received two sets of replacement lamps for testing that would replace all four of these original lamps. In both cases, there is no reflex reflector on the replacement lamps for the vehicle body. However, a reflex reflector is included on the adjacent replacement lamp for the decklid.

As discussed below, these lamps would not comply with Standard No. 108.

By way of background, Standard No. 108 specifies requirements for original and replacement lamps, reflective devices, and associated equipment. Paragraph S1 of Standard No. 108. The standard applies to passenger cars, multipurpose passenger vehicles, trucks, buses, trailers, and motorcycles. S3(a). The vehicle manufacturer is required to certify that the vehicle, when new, meets, among other things, Standard No. 108's requirements with respect to lamps, reflective devices, and associated equipment.

Standard No. 108 also applies to lamps, reflective devices, and associated equipment for replacement of like equipment on vehicles to which this standard applies. S3(c). Thus, the manufacturer of a replacement lamp (or other replacement equipment covered by the standard) is required to certify that the equipment meets the standard's requirements.

S5.8.1 of the standard provides that, with certain exceptions not relevant here, ''each lamp, reflective device, or item of equipment manufactured to replace any lamp, reflective device, or item of associated equipment on any vehicle to which this standard applies,

[1] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

shall be designed to conform to this standard.'' Under S5.8.1, whenever a manufacturer designs a lamp to replace a lamp on a vehicle to which the standard applies, the manufacturer must design that lamp to ensure that the vehicle will continue to comply with Standard No. 108 when the replacement lamp is installed.

Further, the specific requirements of Standard No. 108 that apply to an item of replacement equipment are determined by reference to the original equipment being replaced and the vehicle for which it was designed. As we have stated before, the replacement item must conform to the standard in the same manner as the original equipment for which the vehicle manufacturer certified compliance. See our February 4, 2002, letter to Mr. Daniel Watt. See also our March 13, 2003, letter to Mr. Galen Chen.

As to the sets of replacement lamps you received, the lamps that would replace the original lamps on the vehicle body would not conform to Standard No. 108 because they do not include all of the functions of the original lamps; *i.e.*, they do not include the reflex reflector. It is immaterial that the manufacturer of the replacement equipment would provide a reflex reflector in another lamp. Under S5.8.1 of the standard, ''each lamp'' manufactured to replace any lamp on any vehicle to which the standard applies must be designed to conform to the standard. As you noted in your letter, someone might install the replacement outboard (vehicle body) lamps only, thus causing the vehicle to lose the reflector function entirely.

You also raised another question about the designs: as installed on a vehicle, the reflex reflectors in the replacement lamp systems are located further inboard than the reflectors in the original equipment lamp systems. Standard No. 108 requires rear reflex reflectors to be ''as far apart as practicable.'' The vehicle was certified with the reflex reflectors in a specific location, and replacement lamps which have the effect of moving the reflex reflectors closer together would clearly not be ''as far apart as practicable,'' and therefore would not conform to Standard No. 108.

Of course, replacement equipment must also be certified as having been designed to conform to all of Standard No. 108's requirements that applied to the original equipment; *e.g.*, photometric performance, minimum effective projected luminous lens area, lens material weatherability performance, etc.

Draft Interpretation No. 2

This replies to your letter requesting an interpretation of Federal Motor Vehicle Safety Standard No. 108, Lamps, reflective devices, and other associated equipment. You asked whether light source modifications are permissible for aftermarket lamps.

You stated that manufacturers have submitted replacement lamps to Calcoast-ITL for testing that are intended to replace original equipment lamps. According to your letter, the lamps are ''both front and rear combination lamps.'' As discussed below, replacement lamps must comply with Standard No. 108 using the same light sources as the original equipment.

According to your letter, the lamps fall into two categories, and you have asked questions with regard to each category. The categories and questions are as follows:

1. Replacement Lamp Uses OEM Wiring Harness & Sockets

(a) May a lamp manufacturer design a replacement lamp to use a different wattage bulb, such as switching from an 1157 to a 2057?

(b) May a lamp manufacturer design a replacement lamp to use a different color bulb? Some manufacturers are switching from a clear bulb behind a red or amber rear turn signal lens to an amber bulb behind a clear lens.

2. Replacement Lamp Uses Modified Wiring Harness and Sockets Supplied With Lamp

(a) Some manufacturers of replacement lamps are completely changing the bulbs used including wattage, color and base type by including a replacement wiring harness and sockets. Is this permitted?

(b) Some manufacturers of replacement lamps change the source type from incandescent to sealed LED. Is this permitted?

The answer to all of these questions is no.

By way of background, Standard No. 108 specifies requirements for original and replacement lamps, reflective devices, and associated equipment. S1. It applies to passenger cars, multipurpose passenger vehicles, trucks, buses, trailers, and motorcycles. S3(a). The vehicle manufacturer is required to certify that the vehicle, when new, meets, among other things, Standard No. 108's requirements with respect to lamps, reflective devices, and associated equipment.

Standard No. 108 also applies to lamps, reflective devices, and associated equipment for replacement of like equipment on vehicles to which this standard applies. S3(c). Thus, the manufacturer of a replacement lamp (or other replacement equipment covered by the standard) is required to certify that the equipment meets the standard's requirements.

S5.8.1 of the standard provides that, with certain exceptions not relevant here, ''each lamp, reflective device, or item of equipment manufactured to replace any lamp, reflective device, or item of associated equipment on any vehicle to which this standard applies, shall be designed to conform to this standard.'' Under S5.8.1, whenever a manufacturer designs a lamp to replace a lamp on a vehicle to which the standard applies, the manufacturer must design that lamp to ensure that the vehicle will continue to comply with Standard No. 108 when the replacement lamp is installed.

Further, the specific requirements of Standard No. 108 that apply to an item of replacement equipment are determined by reference to the original equipment being replaced and the vehicle for which it was designed. As we have stated before, the replacement item must conform to the standard in the same manner as the original equipment for which the vehicle manufacturer certified compliance. See our February 4, 2002 letter to Mr. Daniel Watt. *See also* our March 13, 2003 letter to Mr. Galen Chen.

Thus, replacement lamps must conform to the standard in the same manner as the original equipment lamp on the vehicle as certified by the vehicle manufacturer. Each vehicle is certified to Standard No. 108 using a particular light source for a particular lamp. The lamp's ability to meet the standard's requirements with that light source is an inherent part of the certification. Therefore, a lamp manufactured to replace the lamp must meet Standard No. 108's requirements using that light source, in order to be designed to conform to the standard. We would use the same light source in testing a replacement lamp for compliance with Standard No. 108 as was used by the vehicle manufacturer for the original lamp in certifying the vehicle's compliance with the standard.

Further, we note that the lighting systems and overall electrical systems of vehicles are designed with specific light sources in mind, both to ensure proper beam patterns, levels of brightness and electrical performance, and to avoid overloads and risk of fire. In the owner's manual, vehicle manufacturers advise owners what replacement bulbs to use. If a replacement lamp were designed to use a different light source from that

used in the original equipment lamp, it might not work properly, or at all, with the original equipment bulb or with the replacement bulbs specified by the vehicle manufacturer. Moreover, use of a different light source might also adversely affect the performance of the vehicle's overall lighting and electrical systems, and possibly cause overloads and risk of fire.

Submission of Comments

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES.** Comments may also be submitted to the docket electronically by logging onto the Dockets Management System Web site at *http://dms.dot.gov.* Click on ''Help & Information'' or ''Help/Info'' to obtain instructions for filing the document electronically.

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES.** When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

How can I read the comments submitted by other people?

You may read the comments received by Docket Management at the address given above under **ADDRESSES.** The hours of the Docket are indicated above in the same location.

You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov*).

(2) On that page, click on ''search.''

(3) On the next page (*http://dms.dot.gov/search/*), type in the five-digit docket number shown at the beginning of this document. Example: If the docket number were ''NHTSA–2002–12345,'' you would type ''12345.'' After typing the docket number, click on ''search.''

(4) On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments. However, since the comments are imaged documents, instead of word processing documents, the downloaded comments are not word searchable.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Authority: 49 U.S.C. 30111; 49 CFR 501.8(d)(5)

Issued on July 10, 2003.

Jacqueline Glassman,

Chief Counsel.

[FR Doc. 03–18110 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Pipeline Safety: High Consequence Areas for Gas Transmission Pipelines

AGENCY: Office of Pipeline Safety (OPS), Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice; response to petition for reconsideration.

SUMMARY: RSPA/OPS issued a final rule in August 2002 defining high consequence areas (HCAs) for gas transmission pipelines. Trade associations representing pipeline companies transporting the majority of natural gas delivered to customers in the United States petitioned RSPA for reconsideration of the final rule that defined HCAs. Certain aspects of that petition are being addressed through the related rulemaking to require operators to adopt integrity management programs that include additional protective measures for pipeline segments whose failure could affect HCAs. In addition, an advisory bulletin published separately today in the **Federal Register** provides clarification of how operators are expected to implement the ''identified sites'' aspect of the HCA rule. This document indicates where the response to each issue in the petition is being addressed and responds to the issues in the petition not addressed elsewhere.

FOR FURTHER INFORMATION CONTACT: Mike Israni by phone at (202) 366–4571, by fax at (202) 366–4566, or by e-mail at *mike.israni@rspa.dot.gov,* regarding the subject matter of this response. General information about the RSPA/OPS programs may be obtained by accessing RSPA's Internet page at *http://RSPA.dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On August 6, 2002, RSPA/OPS published a final rule on how to identify the populated areas near a pipeline for which the additional protections would be required; (67 FR 50824). These HCAs include not only higher population areas already identified by pipeline operators through the longstanding Class location definitions based on population, but also ''identified sites'' which are intended to pick up additional places where people are located. These additional places could include nursing homes, schools, and campgrounds that may be close enough to the pipeline to be at risk should there be a pipeline failure. In publishing the

final rule, RSPA/OPS announced that it intended to immediately initiate a related rulemaking that would describe the substantive requirements for integrity management programs to add further protections for HCAs.

Petition for Reconsideration

On September 5, 2002, the American Gas Association (AGA), the American Public Gas Association (APGA), the Interstate Natural Gas Association of America (INGAA) and the New York Gas Group (NYGAS) (called collectively, ''Petitioners'') filed a petition for reconsideration of the final rule. When the petition was received, RSPA/OPS was in the final stages of developing an NPRM in the related rulemaking on the substantive requirements for integrity management programs. In addition to the substantive requirements, the draft NPRM proposed an expanded definition of HCAs and described how an operator would determine whether failure of a pipeline segment could impact the HCA and thus be subject to the assessment requirements. RSPA/OPS decided that it would be appropriate to address many aspects of the petition in the NPRM. On January 28, 2003, RSPA/OPS published the NPRM for the substantive requirements. (68 FR 4278) The preamble to the NPRM addressed the petition at 68 FR 4295–4296 and indicated RSPA/OPS's belief that the proposal, and the final rule to follow, would address the more significant of the issues of the petition. This document discusses the remainder of items raised by petitioners but not explicitly addressed in the NPRM.

Response to Remaining Issues

First, Petitioners asked for a stay of the HCA definition pending resolution of the petition. The HCA definition imposes no requirement on any operator to do anything until program requirements in the related rulemaking are made final. Thus a stay is not appropriate in this case. However, the Pipeline Safety Improvement Act of 2003 requires operators to begin conducting baseline integrity assessments of facilities that could affect HCAs by June 17, 2004, and to have integrity management programs in place by December 17, 2004, whether or not RSPA/OPS issues regulations on the matter. This statutory requirement means that operators need to immediately begin identifying HCAs. The guidance provided by Advisory Bulletin ADB–03–03, published in today's **Federal Register**, provides the assurance needed by operators to meet the statutory deadline. With the guidance in the advisory bulletin, operators can identify sites in preparation for required integrity management programs and the public will receive the assurance that the search for ''identified sites'' for inclusion in integrity management programs is clearly understood.

Petitioners' second and third requests—to clarify that the definition applies only to segments of transmission lines and to define potential impact zones—are addressed by language in the proposed integrity management rule. Petitioners' fourth request—that isolated and infrequently occupied buildings be included only to the extent that they would be included under the Class 3 definition—is denied in the preamble to the proposed rule. However, RSPA/OPS requested comment on possible modifications with respect to buildings that are in the category of ''rural churches'' that might alleviate some of the concern. Further response will be made in the final rule. Petitioners' last two requests—for clarification of specified points and for clarification of the HCA definition itself—have been largely addressed in the proposed rule. In addition to points already discussed, the proposed rule addressed concerns about the breadth of the term ''public officials'' by seeking comment on whether the term should be limited to safety or emergency response officials as the ones most likely to have relevant information. To address these concerns, RSPA/OPS is publishing separately in today's **Federal Register**, an advisory bulletin providing guidance for operators in conducting a good faith search. In addition, RSPA/OPS has asked the TPSSC to discuss and vote on recommended guidance on how to clarify, in the final rule, the process of identifying certain sites as high consequence areas.

We now discuss the remaining points on clarification:

1. Petitioners question the inclusion in the HCA definition of two slightly different methods to identify outside areas as HCAs. The first method is by use of the Class 3 location language in 49 CFR 192.5, which uses the concept of a ''well-defined'' area used by at least 20 persons 5 days per week for 10 weeks per year. This method would include a playground used during the week by a day care facility as well as a summer camp, but would not include weekend recreational areas. The second method of identifying outside areas to be protected as HCAs is through the identified sites definition which looks to evidence of the area's use by at least 20 persons on 50 days a year. This second method was intended to identify weekend recreational areas. It is not inconsistent with the first method, but merely adds to the outside areas to be protected. The guidance contained in Advisory Bulletin ADB 03–03 will simplify the process of identifying the additional areas.

2. Petitioners question whether, in identifying an HCA, the building or the pipeline is the reference point for applying the distances. Because an HCA is determined by calculating the radius of potential concern, based on the diameter and pressure of the pipeline, the reference point is not critical to identifying the HCA. Rather, what is important is the distance between the center line of the pipeline and the closest corner of an identified site. The HCA definition uses threshold radii of 300, 660, or 1000 feet, depending on the diameter and pressure of the pipeline, which can be calculated using either the centerline of the pipeline or the closest corner of a building. The proposed integrity management rule would expand the definition to include calculated radii to greater than 100 feet for certain large-diameter, high pressure pipelines, but the method of calculation would not change. As discussed at the advisory committee, RSPA is considering using calculated potential impact radii instead of the threshold distances. But again, the calculated distance would be the same whether the measurement is made from the centerline or from the corner of the building.

3. Petitioners argue that the requirement for identifying as an HCA a building occupied by persons of impaired mobility could raise ''privacy and discrimination concerns'' because it would require ''an invasive procedure'' to determine the occupancy of these buildings. There is no requirement for an operator to conduct an invasive search to identify buildings housing people of limited ability. The means provided in the rule—visible marking, licensing, consultation with public officials, and official lists—are external and do not involve any invasion of privacy.

4. Petitioners note that it would be difficult to determine if licensed facilities would meet the definition. As an example, petitioners argue that it would be difficult to determine if a registered home day care facility has more than 20 persons in residence. This is not the best example since such a facility would be included as a facility with persons of limited mobility. A more appropriate example would be a licensed bingo hall. Even though the facility is licensed, an operator is not required to include it as an identified site unless there is evidence of use by

at least 20 persons. Physical checking may provide that evidence. The license itself may provide sufficient information for the determination. Consultation with public officials may also provide that information. As stated in Advisory Bulletin ADB 03–03, RSPA/OPS does not require an exhaustive search, only a good faith one.

5. Petitioners note that a facility used by persons of limited mobility may be listed only on an obscure Web site and an operator may miss it. RSPA/OPS does not intend to hold an operator responsible for identifying a facility as an HCA solely on the basis of its listing on an obscure Web site. The final rule pointed to the Federal Government's web portal (*http://www.Firstgov.gov*) and telephone directories for information available about assisted-living, nursing, and elder care facilities and schools. Official State Web sites would also be appropriate. RSPA/OPS does not require an exhaustive search, only a good faith one.

6. Petitioners note that maps maintained by government agencies may not be updated sufficiently often and provide sufficient detail to be helpful in identifying HCAs. It is an operator's choice as to which maps to rely on. If an operator determines that maps are not up-to-date or are not sufficiently detailed, an operator should not rely on them.

7. Petitioners argue that requiring an operator to utilize four criteria to locate ''identified sites'' is an ''incomprehensible and impossible'' task since operators now rely on the weekday patrolling to locate population for the purposes of determining Class locations. RSPA/OPS continues to insist that operators must go beyond the existing practice and identify HCAs that are outside the traditional Class 3 and 4 locations, but where the impacts on population may be significant. However, RSPA/OPS recognizes the importance of providing the regulated community assurance that good faith efforts at compliance will be recognized. Guidance provided in Advisory Bulletin ADB 03–03 will help the operator and ensure that these additional sites are identified.

Issued in Washington, DC, on July 11, 2003.

Stacey L. Gerard,

Associate Administrator for Pipeline Safety.

[FR Doc. 03–18120 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Pipeline Safety: Identified Sites as Part of High Consequence Areas for Gas Integrity Management Programs

AGENCY: Office of Pipeline Safety (OPS), Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice; issuance of advisory bulletin.

SUMMARY: On August 6, 2002, RSPA/OPS published a final rule on how to identify the populated areas near a pipeline for which additional protections would be required (67 FR 50824). These ''high consequence areas'' (HCAs) include not only population areas already identified by pipeline operators through the longstanding Class location definitions, but also ''identified sites,'' 49 CFR 192.761(f). Inclusion of identified sites is intended to pick up isolated population areas which are not picked up through the Class location process. These could include isolated nursing homes, schools, and campgrounds that may be close enough to the pipeline to be at risk should there be a pipeline failure. Commenters expressed concerns that what was intended to be a relatively simple task, identifying certain sites as high consequence areas, could become a never-ending search. RSPA/OPS is providing guidance in this advisory bulletin to provide the necessary clarification. With this guidance, operators can identify sites in preparation for required assessments and integrity management programs. The public will receive the assurance that the search for ''identified sites'' for inclusion in integrity management programs is clearly understood and thorough. The advisory bulletin provides guidance on a good faith effort in conducting this search.

Further, at a meeting of the Technical Pipeline Safety Standards Committee scheduled for July 31, 2003, RSPA/OPS has added to the agenda further discussion about the advisability of modifying the final rule language to include this advice.

ADDRESSES: You may contact the Dockets Facility by phone at (202) 366–9329, for copies of the proposed rule or other material in the docket. All materials in this docket may be accessed electronically at *http://dms.dot.gov/search.* Once you access this address, type in the last four digits of the docket number shown at the beginning of this notice (in this case 7666), and click on search. You will then be connected to all relevant information.

FOR FURTHER INFORMATION CONTACT: Mike Israni by phone at (202) 366–4571, by fax at (202) 366–4566, or by e-mail at *mike.israni@rspa.dot.gov,* regarding the subject matter of this advisory bulletin. General information about the RSPA/OPS programs may be obtained by accessing RSPA's Home page at *http://www.rspa.dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Advisory Bulletin (ADB–03–03)

To: Operators of gas transmission pipelines.

Subject: Identified sites for possible inclusion as high consequence areas (HCAs) in gas integrity management programs.

Purpose: To provide guidance to operators on what RSPA/OPS considers to be a good faith effort to discover ''identified sites'' as defined by 49 CFR 192.761(f).

Advisory: High consequence areas for gas transmission pipelines are defined to include certain buildings and outside areas, not located within Class 3 or 4 locations, but which nonetheless contain people who could be at risk in the event of a pipeline failure. These areas, known as ''identified sites,'' are specified in 49 CFR 192.761(f). Paragraphs (5) and (6) of the section provide the substantive features of the sites; paragraphs (1) through (4) list the sources an operator is to explore to discover these sites. This guidance addresses the sources in paragraphs (1) through (4) rather than the substantive features found in paragraphs (5) and (6).

As written, the rule requires an operator to include as an ''identified site'' a building or outside area meeting the substantive features of paragraphs (5) or (6) if the site:

(1) Is visibly marked;

(2) is licensed or registered by a Federal, State or local agency;

(3) is known by public officials; or

(4) is on a list or map maintained by or available from a Federal, State, or local agency or a publicly or commercially available database.

Although it is possible to read this language as requiring an operator to perform an exhaustive search of every possible source for such sites, RSPA/OPS does not intend that an operator perform an exhaustive search, only a good faith one.

Obviously, an operator will already know of many sites that meet the criteria of paragraphs (5) and (6) through the operation and maintenance activities on the pipeline right-of-way, including patrolling, the operator

conducts on a routine basis. An operator would, of course, include these sites as ''identified sites.'' However, there will be sites which are not likely to be known through routine operation and maintenance activities. RSPA/OPS believes that the best way for operators to locate sites they are unlikely to discover through routine activities is to consult the entities responsible for safety and emergency response in the vicinity of the pipeline.

Accordingly, RSPA/OPS will accept, as a good faith search in satisfaction of §192.761(f)(1)–(4), a search by an operator that discovers ''identified sites'' based on knowledge gained by routine operation and maintenance activities as well as sites identified through consultation with appropriate public officials. The appropriate public officials are those with safety or emergency response or planning responsibilities who indicate to the operator that they know the location of sites that meet the substantive description of § 192.761(f)(5) or § 192.761(f)(6). This could include officials on a local emergency planning commission or relevant Native American tribal officials.

Consultation with public officials having safety or emergency response or planning responsibilities may result in an end of the search for ''identified sites''. If, however, an operator consults public officials with safety or emergency response or planning responsibilities and these officials inform the operator that they do not have the needed information, then an operator must do more. However, the task of locating these sites is not endless. RSPA/OPS will accept as adequate the operator's use of one of the other means spelled out in paragraphs (1), (2), and (4) of §192.761(f) so long as the operator documents a rationale for the choice that demonstrates that the operator is truly trying to locate the ''identified sites.'' For example, if public officials with safety or emergency response or planning responsibilities indicate that they believe that they know about all of the areas except for assisted-living facilities, an operator might decide that the most fruitful alternative source of information would be a county or State licensing authority. As another example, if public officials with safety or emergency response or planning responsibilities indicate little knowledge about the location of outside recreation facilities, the operator might decide that county and State websites that listed recreational activities in the county would be the best source. RSPA/OPS will not expect an operator to conduct an endless iterative search of all possible sources.

A similar rule of reasonableness applies with regard to an operator's use of the means spelled out in 192.761(f)(4); namely, ''Is on a list or map maintained by or available from a Federal, State, or local agency or a publicly or commercially available database.'' Although it is possible to read this language as requiring an operator to perform an exhaustive search of every on-line map or database, this is not what RSPA/OPS intends. RSPA/OPS expects an operator to consult those lists or maps that are readily known to the operator and readily available to the public at large. Good examples for information available about assisted-living, nursing, and elder care facilities and schools would be the Federal Government's official Web portal (*http://www.Firstgov.gov*) and telephone directories. Official State Web sites would also be appropriate. An operator might find sources such as Geographic Data Technology or MapQuest helpful in locating particular sites.

In the process of locating ''identified sites'' as HCAs, RSPA/OPS will require that an operator conduct a good faith search, not an exhaustive one.

II. Background

On August 6, 2002, RSPA/OPS published a final rule on how to identify the populated areas near a pipeline for which additional protections would be required (67 FR 50824). These HCAs include not only population areas already identified by pipeline operators through the longstanding Class location definitions, but also ''identified sites'', 49 CFR 192.761(f). Inclusion of ''identified sites'' is intended to pick up isolated population areas which are not picked up through the Class location process. These could include isolated nursing homes, schools, and campgrounds that may be close enough to the pipeline to be at risk should there be a pipeline failure.

Identification of HCAs is a necessary precondition to the establishment of integrity management plans. The Pipeline Safety Improvement Act of 2002 (PSIA) requires operators to begin conducting assessments by June 17, 2004, and to have integrity management programs in place by December 17, 2004. Trade associations representing pipeline companies transporting the majority of natural gas delivered to customers in the United States, state and public representatives, as well as the Federal advisory committee for pipeline safety regulations, have raised questions about how to implement the identified sites aspect of the HCA definition.

RSPA/OPS initiated a related rulemaking with a notice of proposed rulemaking (NPRM) published January 28, 2003, (68 FR 4278), responsive to a mandate of the PSIA. The NPRM proposed substantive requirements to establish integrity management programs that would provide additional protections for HCAs. In addition, the NPRM proposed to modify the HCA definition to better identify population potentially impacted by a pipeline failure.

RSPA/OPS conducted four public meetings to discuss aspects of the NPRM, two of which focused on the need to clarify how to locate outdoor areas where people congregate and facilities which housed populations that were mobility impaired. Discussions mentioned the burdens of identifying these sites. The proposed definition of HCAs did not contain the term ''identified site'' (67 FR 1108, January 9, 2002). Instead, the proposed definition simply stated that operators would have to identify facilities containing persons of impaired mobility and buildings and areas occupied by at least 20 persons 50 days per year. Industry commenters frequently noted that an inflexible rule that required operators to identify these sites would be burdensome, and the term ''identified site'' became generally understood through these discussions. Operators could not get the information from public officials during the liaison already required by 49 CFR part 192 because public officials did not have the necessary information. Operators would have no choice but to change both the manner and the frequency of their patrols of the right-of-way, a very costly proposition.

At the four public meetings following publication of the NPRM, various other persons raised concerns about the clarity of the definition. A representative of Safe Bellingham, which represents citizens concerned about pipeline safety, stressed the need to cover areas where people congregate outdoors.

On May 26–28, the Technical Pipeline Safety Standards Committee considered the NPRM in this related rulemaking. The Committee urged that RSPA/OPS look for clarity over complexity, seek public understandability of the rule, and focus the greatest effort on the potential for greatest harm. Members of the Committee strongly urged the Committee to examine the clarity of the ''identified site'' definition. Industry representatives pointed to their petition for reconsideration of the HCA final rule for their concerns. (The petition is

addressed in a separate response published today in the **Federal Register**.) Industry representatives described in detail the difficulties of applying the current definition of ''identified site''.

The Committee also heard from Mr. Steve Halford, the Fire Chief for the City of Nashville, who was representing the International Association of Fire Chiefs, in discussing a study on excess flow valves not related to the integrity management rulemakings. Although Chief Halford made a presentation to the advisory committee on another topic, he graciously agreed to answer impromptu questions about the knowledge of public officials with respect to locations that RSPA/OPS intends to be ''identified sites.'' Chief Halford readily asserted that fire departments and other public safety and emergency response officials would normally have information about these sites. Chief Halford also suggested that local planning bodies and the local emergency planning committees would be good sources for the information. Based on the discussion, the Committee advised RSPA/OPS to clarify the meaning of the rule.

RSPA/OPS did not intend that identification of locations outside of Class 3 and 4 be burdensome and decided to provide relief. Industry commenters, including petitioners NYGAS and INGAA, had suggested that use of available sources such as licensing and publicly available lists would be a good avenue. Thus the HCA definition includes a definition of ''identified sites'' that provides both the types of areas to be identified and the means for an operator to locate these sites.

Although the regulation is stated as a list of steps, RSPA/OPS has never intended that an operator perform an exhaustive search of every possible source of information that may be available. RSPA/OPS requires only a good faith effort to discover ''identified sites.'' As discussed in the advisory, pipeline operators who consult public safety or emergency response or planning officials who indicate that they have knowledge of the identified sites need not do more.

Further, at a meeting of the Committee scheduled for July 31, RSPA/OPS has added to the agenda further discussion about the advisability of modifying the final rule language to include this advice.

Subsequent to the publication of the HCA final rule, and in support of the need to assure that ''identified sites'' are clearly known, RSPA/OPS initiated extensive efforts to involve local and State officials in sharing responsibility for pipeline safety. We believe that public safety and emergency response officials are likely to have the knowledge needed on ''identified sites.'' In addition, RSPA/OPS expects that the knowledge of these officials will improve for several reasons. First, section 5 of the Pipeline Safety Improvement Act of 2002 requires pipeline operators to review and enhance their public education programs by December 17, 2003. Among other things, these public education programs will provide better information to officials from municipalities and school districts about the possible hazards from an unintended release from a pipeline. This enhanced information about the risks will improve local emergency response planning efforts.

Further, under its Community Assistance and Technical Service Program, RSPA/OPS has already hired at least one senior inspector in each Federal region who is providing local officials briefings and data to enhance their efforts to protect pipelines from damage, target community awareness programs, and improve the response capabilities in the event of a pipeline failure. In addition, RSPA/OPS provides grant funding to the National Association of State Fire Marshals and the Common Ground Alliance for public education initiatives among other things. These initiatives will result in local officials who are better informed about where pipelines are located, how to avoid damaging them, how to recognize and report emergencies that may arise, and the need to determine isolated population areas near pipelines that need additional protection.

In addition, RSPA/OPS realizes that some tribal lands may not have traditional, readily identifiable safety or emergency response officials. Thus RSPA/OPS intends to consult with the Council of Energy Resource Tribes, a coalition of tribes who have energy resources, about the best way to locate ''identified sites'' on these tribal lands. RSPA/OPS will then share the results of that consultation with the affected pipeline operators and provide any additional guidance that may be needed before the effective date of a final rule imposing substantive requirements for integrity management programs.

Issued in Washington, DC, on July 11, 2003.

Stacey L. Gerard,

Associate Administrator for Pipeline Safety.

[FR Doc. 03–18121 Filed 7–16–03; 8:45 am]

BILLING CODE 4910–60–P

VALLES CALDERA TRUST

National Environmental Policy Act (NEPA) Procedures of the Valles Caldera Trust for the Valles Caldera National Preserve

AGENCY: Valles Caldera Trust.

ACTION: Notice of final procedures to implement NEPA.

SUMMARY: The Board of Trustees of the Valles Caldera Trust adopts these final NEPA procedures, hereafter referred to as ''procedures'', for implementation of National Environmental Policy Act (NEPA) and to aid in the overall management and public use of the Valles Caldera National Preserve. The procedures for the Trust are intended to supplement federal NEPA procedures of the Council on Environmental Quality (CEQ) found at 40 CFR 1500 through 1508 and adopted by the Board of Trustees on August 8, 2001. The Trust's procedures are to be maintained by the Trust and are readily available to the public. It is anticipated that as experience is gained in the implementation of the Trust's procedures, appropriate improvements will be proposed. The procedures will apply to the fullest extent practicable to analyses and documents by the Board of Trustees of the Valles Caldera Trust.

EFFECTIVE DATE: These procedures are effective on July 17, 2003.

ADDRESSES: Gary Ziehe, Executive Director, Valles Caldera Trust, 2201 Trinity Drive, Suite C, Los Alamos, NM 87544. email: *nepaprocedures@vallescaldera.gov*.

FOR FURTHER INFORMATION CONTACT: Gary Ziehe, Executive Director, Valles Caldera Trust, 2201 Trinity Drive, Suite C, Los Alamos, NM 87544. Telephone: (505) 661–3333.

SUPPLEMENTARY INFORMATION:

I. Introduction

These NEPA procedures add direction to guide employees of the Valles Caldera Trust regarding requirements of the National Environmental Policy Act. The Council on Environmental Quality does not direct agencies to prepare a NEPA document before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. Agency NEPA procedures are internal procedural guidance intended to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR

1505.1 and 1507.3(b). The Valles Caldera Trust has provided an opportunity for public review and has consulted with the Council on Environmental Quality during the development of these procedures. The determination that establishing NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service*, 73 F. Supp. 2d 962, 947, 954–55 (7th Cir. 2000).

Proposed NEPA procedures for the Valles Caldera Trust were published in the **Federal Register** of February 11, 2003 (Vol. 68, No. 28). Comments were received from individuals and the Valles Caldera Coalition, Pueblo of Jemez, and Forest Guardians. The comments proved to be very helpful in identifying improvements in the proposed procedures. In general, requests were made to clarify the relationship of the Board of Trustees and the designation of the person responsible for the planning and implementation of activities within the Preserve. Requests were made to improve the description of the comprehensive program for management of the Preserve and the relationship of long-term guidance, the consideration and selection of specific stewardship actions, and the monitoring of results. Also, many reviewers requested improvements in the use of terms in the proposed procedures and clarification of the conditions that warrant use of a categorical exclusion from the preparation of an environmental document. It is apparent that considerable thought and effort was devoted to review of the proposed procedures and comment for their improvement. A 16-page summary of the comments received and response by the Valles Caldera Trust is available at the Trust Office in Los Alamos, NM and at the Trust's web site.

Reviewers requested that the procedures include a description of the Trust. The Valles Caldera Preservation Act, Public Law 106–248, (the Act) created the Valles Caldera Trust (the Trust), a wholly owned government corporation, to manage the newly created Valles Caldera National Preserve, the tract of land previously referred to as the Baca Ranch. The Trust assumed responsibility for managing the lands and resources of the Preserve on August 2, 2002. The Preserve includes approximately 89,000 acres in north-central New Mexico, comprising the majority of the 1860 land grant known as the Baca Location No. 1. A nine-member Board of Trustees governs the Trust and the Executive Director oversees management of the Trust and the Preserve.

The Act established the Preserve to protect and preserve the scientific, scenic, geologic, watershed, fish, wildlife, historic, cultural, and recreational values of the Preserve, and to provide for multiple use and sustained yield of renewable resources within the Preserve. Under the Act, the Trust operates the Preserve as a working ranch and is to plan to achieve a financially, self-sustaining operation within 15 years, consistent with the purposes of the Act.

II. Legislative History of the Trust

(a) *A unique experiment in managing public land.* The Valles Caldera National Preserve is a unique experiment in the administration of public land. Public Law 106–248 authorizing creation of the Preserve established several findings and purposes for the management of the Preserve.

Congress finds that:

(1) The Baca ranch comprises most of the Valles Caldera in central New Mexico, and constitutes a unique landmass, with significant scientific, cultural, historic, recreational, ecological, wildlife, fisheries, and productive values;

(2) The Valles Caldera is a large resurgent lava dome with potential geothermal activity;

(3) The land comprising the Baca ranch was originally granted to the heirs of Don Luis Maria Cabeza de Vaca in 1860;

(4) Historical evidence, in the form of old logging camps and other artifacts, and the history of territorial New Mexico indicate the importance of this land over many generations for domesticated livestock production and timber supply;

(5) The careful husbandry of the Baca ranch by the current owners, including selective timbering, limited grazing and hunting, and the use of prescribed fire, have preserved a mix of healthy range and timber land with significant species diversity, thereby serving as a model for sustainable land development and use;

(6) The Baca ranch's natural beauty and abundant resources, and its proximity to large municipal populations, could provide numerous recreational opportunities for hiking, fishing, camping, cross-country skiing, and hunting;

(7) The Forest Service documented the scenic and natural values of the Baca ranch in its 1993 study entitled ''Report on the Study of the Baca Location No. 1, Santa Fe National Forest, New Mexico'', as directed by Public Law 101–556;

(8) The Baca ranch can be protected for current and future generations by continued operation as a working ranch under a unique management regime which would protect the land and resource values of the property and surrounding ecosystem while allowing and providing for the ranch to eventually become financially self-sustaining;

(9) The current owners have indicated that they wish to sell the Baca ranch, creating an opportunity for Federal acquisition and public access and enjoyment of these lands;

(10) Certain features on the Baca ranch have historical and religious significance to Native Americans which can be preserved and protected through Federal acquisition of the property;

(11) The unique nature of the Valles Caldera and the potential uses of its resources with different resulting impacts warrant a management regime uniquely capable of developing an operational program for appropriate preservation and development of the land and resources of the Baca ranch in the interest of the public;

(12) An experimental management regime should be provided by the establishment of a Trust capable of using new methods of public land management that may prove to be cost-effective and environmentally sensitive; and

(13) The Secretary may promote more efficient management of the Valles Caldera and the watershed of the Santa Clara Creek through the assignment of purchase rights of such watershed to the Pueblo of Santa Clara.

(b) *Purposes for management of the Preserve.* The Act established five purposes for the management of the Preserve:

(1) To authorize Federal acquisition of the Baca ranch;

(2) To protect and preserve for future generations the scientific, scenic, historic, and natural values of the Baca ranch, including rivers and ecosystems and archaeological, geological, and cultural resources;

(3) To provide opportunities for public recreation;

(4) To establish a demonstration area for an experimental management regime adapted to this unique property which incorporates elements of public and private administration in order to promote long-term financial sustainability consistent with the other purposes enumerated in this subsection; and

(5) To provide for sustained yield management of Baca ranch for timber

production and domesticated livestock grazing insofar as is consistent with the other purposes stated in the Act.

(c) *Management of the Preserve.* A nine-member Board of Trustees appointed by the President is to oversee management of the Preserve and establish operating principles. The Trust is a wholly owned government corporation known as the Valles Caldera Trust. The Trust is empowered to conduct business in the State of New Mexico and elsewhere in the United States in furtherance of its corporate purposes and possess all necessary and proper powers for the exercise of the authorities vested in it. The Trust is to:

(1) Provide management and administrative services for the Preserve;

(2) Establish and implement management policies which will best achieve the purposes and requirements of this title;

(3) Receive and collect funds from private and public sources and to make dispositions in support of the management and administration of the Preserve; and

(4) Cooperate with Federal, State, and local governmental units, and with Indian tribes and Pueblos, to further the purposes for which the Preserve was established.

III. Procedures for Management of the Preserve

In furthering the intent of Congress and to clarify the operating principles of the Trust, it is necessary and appropriate to establish procedures for the consideration of pending management actions of the Trust and implementation of the NEPA. The following procedures are intended to effectively and efficiently implement the principles of the NEPA and create a collaborative working relationship among the Trust and tribal governments, citizens, and federal, state, and local authorities. A section-by-section description of the procedures follows along with a brief account of the changes made in the proposed NEPA procedures based on the comments from reviewers.

100 Title. This section displays the title of the procedures with its numbering system beginning at 100.

100.1 Authority. This section lists the federal authorities from which the procedures are developed.

100.2 Purpose. The purpose of the procedures is displayed in paragraphs (a) to (d). It is important to note that the procedures are intended to amplify Congressional intent to provide innovative ways to implement effective and efficient management of the Trust and the Preserve. The term ''program'' is removed from the procedures to more accurately describe Congressional intent and to reduce confusion in describing the overall management of the Preserve. The procedures are intended to integrate NEPA with the planning and decisionmaking of the Trust, make NEPA more useful to decisionmakers and the public, and ensure that environmental information is readily available before, during, and after decisions are made. The procedures are intended to supplement government-wide NEPA procedures found at 40 CFR 1500–1508. The government-wide, NEPA procedures were adopted by the Board of Trustees on August 8, 2001.

101 Integration of NEPA with Planning and Decisionmaking of the Trust. Sections 101.1 to 101.10 describe the process for integrating NEPA with the planning and decisionmaking of the Trust. Each of the sections, 101.1 to 101.10, of the procedures is described below:

101.1 Purposes and Principles. Paragraph (a) references the findings of Congress regarding the purposes and principles for management of the Preserve. The comprehensive management of the Preserve called for in the enabling legislation is achieved through strategic guidance and stewardship actions authorized by the Trust's Board of Trustees. The term ''strategic guidance'' is added to the description of how comprehensive management of the Preserve is achieved. Several reviewers asked for clarification of the roles of the Board of Trustees and the Responsible Official as described in the proposed procedures. The following sections of the procedures describe the overall management of the Preserve which is to be achieved through the establishment of strategic guidance by the Board of Trustees and stewardship actions undertaken by the Responsible Official, the person responsible for planning and implementing stewardship actions as authorized by the Board of Trustees.

Paragraph (b) emphasizes the vital role of citizens in the overall management, use, and enjoyment of the Preserve. As described in the revised section 101.7, Public Involvement, and throughout the procedures, citizens are encouraged to participate with the Trust in the overall management of the Preserve.

The fundamental role of monitoring and the consideration of new information among the Trust and the public are emphasized in (c). These activities are important in adapting on-going and future stewardship actions to changing conditions. The term ''on-going'' is added to emphasize that monitoring results are to be used to adjust stewardship actions that are underway as well as those that may take place in the future.

Paragraph (d) presents the 10 guiding principles for management of the Preserve adopted by the Board of Trustees on December 13, 2001. These 10 guiding principles are referred to as ''management principles'' in the procedures, and are intended to guide the management of the Preserve. It is noted that the whole of the Preserve is greater than the sum of its parts. Stewardship actions within the Preserve are intended to complement the entire Preserve and enhance the unique character of the Preserve envisioned by the Congress.

101.2 Terminology. This section of the procedures lists 17 terms and their meanings as they are used throughout the text. It is helpful to review these terms and their meanings to promote their consistent use and interpretation by the Board, staff of the Trust, and citizens involved in the planning and decisionmaking of Trust. The following improvements to the proposed procedures are made to respond to public comments and to clarify meanings of terms used in the procedures:

Comprehensive management program is removed from the terminology section. The description of the comprehensive management of the Preserve is revised in section 101.10, Comprehensive Management of the Preserve, and is no longer needed in the terminology section.

Adaptive management is added to the procedures by the following text. ''Adaptive management'' means adjusting stewardship actions or strategic guidance based on knowledge gained from new information, experience, experimentation, and monitoring results, and is the preferred method for managing complex natural systems.

Goal. This term is improved by replacing the term ''Responsible Official'' with ''Trust'' to more accurately state that the achievement of a goal is sought by the entire Trust in addition to the Responsible Official.

Human environment is added to the procedures by the following text. ''Human environment'' has the same meaning as that described in the CEQ regulations for implementing the procedural provisions of the NEPA. ''Human Environment'' shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See definition of ''effects'' in 40 CFR 1508.8.) This means

that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Implementing decision. For this term, as elsewhere in the text of the procedures, the phrase, ''implement and adopt,'' is revised by removing the phrase ''and adopt.'' This is done to clarify that the Responsible Official is the person who makes an implementing decision. The Board of Trustees reserves the authority to adopt or amend strategic guidance.

Purpose and need. The phrase ''and the goal(s) sought'' is added to the end of the meaning of ''purpose and need''. This addition is intended to clarify that the concise explanation of why a stewardship action is being proposed should include the identification of the one or more goals sought by proposing a stewardship action.

Responsible Official. Several reviewers commented that the meaning of the term was unclear in the proposed procedures. The term is rewritten to read, ''Responsible Official'' means the Executive Director of the Trust and, consistent with delegated authority, the Preserve Manager and other Preserve staff, or the Chair of the Board of Trustees if specifically designated by the Board of Trustees. This change in the meaning of the term is intended to clarify that the person responsible for a stewardship action is the Executive Director of the Trust or staff operating within their delegated authorities. Also, if the Board of Trustees chooses to propose a stewardship action and, after appropriate environmental review and documentation, make an implementing decision, then they must specifically designate the Chair of the Board as the Responsible Official for purposes of the stewardship action under consideration.

Stewardship action. The term is rewritten to read, ''Stewardship action'' means an activity or group of activities consisting of at least one goal, objective, and performance requirement proposed or implemented by the Responsible Official that may:

(1) Guide or prescribe alternative uses of the Preserve upon which future implementing decisions will be based; or

(2) Utilize or manage the resources of the Preserve.

This revision of the meaning of the term is made to clarify that only the Responsible Official may propose a stewardship action. Several reviewers discussed confusion regarding the identification of the Responsible Official and his or her role in proposing, evaluating, or implementing a stewardship action. In the proposed procedures, the Board of Trustees could also propose and adopt a stewardship action. As described above in the meaning of ''Responsible Official'', if the Board of Trustees chooses to propose a Stewardship action, the Board may do so only by specifically designating the Chair of the Board as the Responsible Official.

Stewardship register. The phrase, ''including applicable environmental documents'' is added to the meaning of ''stewardship register''. The term ''and appended'' is removed here and elsewhere in the text of the procedures. This change is made to clarify that the appropriate environmental documents should be included with the stewardship register rather than appended. The stewardship register is to be integrated with the appropriate environmental document. A reviewer would expect to see a stewardship register along with its associated environmental documents. As noted in the text for the sample stewardship register in Exhibit I, if an environmental document is not associated with a stewardship action, the stewardship register must identify the applicable category for exclusion of such a document.

Strategic guidance. This term is modified from the proposed procedures by the elimination of (c), ''one or more stewardship actions.'' This change is made to clarify, as described above regarding stewardship actions, that only the Responsible Office may propose or implement a stewardship action. Item (b) is improved by specifying that the Trust may direct the Responsible Official to consider one or more stewardship actions or an administrative matter related to the operation of the Preserve. From the comments of reviews, it appeared that the proposed procedures were confusing regarding the role of the Board of Trustees in directing that a particular stewardship action should undergo consideration by the Responsible Official. This change in the text is intended to clarify the roles of the Board of Trustees and the Responsible Official.

Summary of Monitored Outcomes. This term is replaced with the term ''State of the Preserve'' to better communicate the meaning of the evaluations that are anticipated to take place prior to removing, amending, continuing, or adopting one or more of the goals of strategic guidance. The role of the Board of Trustees in establishing strategic guidance is clarified in the language describing the comprehensive management of the Preserve in section 101.10.

101.3 Overall Procedures. In paragraphs (a) to (e) of this section, the overall procedures for integrating NEPA within the planning and decisionmaking of the Trust are presented. Paragraph (a) points out that comprehensive management of the Preserve is achieved through strategic guidance adopted by the Board and through the selection and implementation of appropriate stewardship actions. As described in section 101.2, Terminology, stewardship actions may be site-specific actions as well as broader, planning-related goals, objectives, and performance requirements that set the stage for future implementing decisions. It is the intent of the Trust to maintain open and collaborative working relationships with all government and private parties interested in the Preserve. Positive working relationships are envisioned during the consideration, implementation, and monitoring of stewardship actions. The paragraph concludes with a statement that the information regarding a stewardship action is available to the public in accordance with applicable law.

Paragraph (b) establishes a standard that a clear statement of the purpose and need for each stewardship action must accompany the proposal for action by the Responsible Official. The term ''consistent with strategic guidance'' is added to the requirements of the purpose and need statement. The addition of this term is intended to ensure that each proposed stewardship action conforms to the strategic guidance established by the Board of Trustees. Each proposed stewardship action must have a clear explanation of why it is necessary. In addition, a proposed stewardship action must be consistent with the identified goals sought through its implementation.

Paragraph (c) states that the Responsible Official, based on public comments or other reasons, may prepare an environmental document to improve understanding of a proposal prior to making an implementing decision. For many stewardship actions, an environmental document is required. The requirements related to the evaluation of stewardship actions and the preparation of the appropriate environmental documents are described in section 101.5.

It is stated in paragraph (c) that the outcomes of implemented stewardship

actions are monitored to provide information to aid future choices, consistent with adaptive management. Based on comments received, the meaning of ''adaptive management,'' is added to section 101.2, Terminology. As noted in the proposed procedures, ''adaptive management'' is the preferred means for managing complex natural systems, builds on learning based on common sense, experience, experimentation, and monitoring results. Practices within the Preserve are to be adjusted based on what is learned. It is the intent of the Trust to respond positively to change. Through adaptive management, the Trust's focus is on accelerated learning and adapting through partnerships based on finding common ground where managers, scientists, and citizens learn together to create and maintain sustainable ecosystems. Learning in the achievement of sustainable ecosystems requires an array of strategies and partnerships of managers and citizens working directly with scientists to provide a holistic view of desired conditions and positive, creative responses to change. Through adaptive management, the Trust will provide for multiple use and sustained yield of renewable resources of the Preserve.

Paragraph (d) is revised to emphasize that the Trust is to prepare a ''State of the Preserve'' at least once every five years after August 2, 2002, the date the Trust assumed management responsibility of the Preserve. As noted in section 101.2, Terminology, the term ''State of the Preserve'' is described. The requirement to prepare a concise account of the systematic review of monitored outcomes along with review of other information is intended to provide a technical and scientific basis for the comprehensive management of the Preserve and aid in the consideration of the goals within strategic guidance that may be adopted by the Board of Trustees. As described in the revised section 101.10, The Comprehensive Management of the Preserve, the State of the Preserve is intended to provide valuable information to the Board of Trustees as they consider amending, eliminating, continuing, or adding to the goals of strategic guidance. A current State of the Preserve must be reviewed before the Board may act regarding a goal of strategic guidance. This change in the procedures is made based upon requests to strengthen the role of the Board of Trustees in establishing overall direction and to ensure that in the future the Board does not change its direction without being fully informed regarding the overall condition of the Preserve and the evolving natural and social environments related to the Preserve.

Section 101.3 of the procedures concludes with paragraph (e) that describes the on-going, adaptive management regime of the Preserve. The overall procedures are intended to efficiently and effectively achieve the goals of the Trust and NEPA and eliminate unnecessary or redundant paperwork.

101.4 Proposing a Stewardship Action and Following its Progress. Paragraphs (a) to (d) describe how a stewardship action is proposed for consideration and the requirements that must be followed. Paragraph (a) states that the Responsible Official may propose a stewardship action at any time. However, each stewardship action must be accompanied by a clear statement of its purpose and need and recorded in a stewardship register. The required items of a stewardship register are displayed in Exhibit I. If the Board approves consideration of a proposed stewardship action, the stewardship register will be made available to the public through appropriate media as soon as practicable and throughout the process, leading either to termination of the proposal or to an implementing decision and subsequent monitoring of outcomes. The stewardship registers will also, as relevant, contain information regarding completion of stewardship actions and the monitoring of one or more of the outcomes.

Paragraph (b) states that the public and government officials have many opportunities to review the activities of the Trust. Based on several comments, the text is revised in sentence two to read. ''The Responsible Official will request public review and comment on a proposed stewardship action, its purpose and need, alternatives, and/or anticipated outcomes as described in 101.7.'' If comments are requested and received within the dates specified, the Responsible Official must consider the comments before making an implementing decision. It is the intent of the Trust to maintain open and collaborative working relationships. Comments from the public or government officials may include a wide variety of media including, but not limited to, personal discussions, letters, photos, or electronic communications.

The procedures for amending and keeping the stewardship registers current are described in paragraph (c). The Trust staff responsible for any entry in a stewardship register must record their name and the date of entry to provide an accurate record. The Trust staff may prepare additional documents or electronic media to manage activities associated with one or more stewardship actions and other matters related to administration of the Preserve. These additional documents are intended to aid in the planning, execution, and general management of Trust activities.

Section 101.4 concludes with paragraph (d) that states that the Executive Director of the Trust is responsible for the overall review of agency NEPA compliance and preparation of any necessary environmental documents.

101.5 Environmental Evaluation and Documentation. The title and text of this section is revised from ''Evaluating a Stewardship Action'' to more accurately describe the requirements of this section and the three following sections, 101.51 to 101.53, which describe required environmental evaluation and documentation. Paragraph (a) is revised to read. ''An environmental document must be prepared and considered before the Responsible Official can make an implementing decision unless a stewardship action is within a categorical exclusion listed in 101.6.''

Paragraph (b) points out that the Responsible Official may, in the absence of extraordinary circumstances, make an implementing decision without the preparation of an environmental document (an environmental assessment, finding of no significant impact, notice of intent, or environmental impact statement) for proposed stewardship actions that do not individually or cumulatively have a significant effect on the human environment.

Because the requirements in (c) of the proposed procedures are included in the revised (a), (c) is no longer needed and is removed.

The following sections, 101.51 to 101.53, describe the environmental impact statement, environmental assessment, and finding of no significant impact. Procedures for the preparation of a notice of intent to prepare an environmental impact statement are described in CEQ regulations at 40 CFR 1501.7.

101.51 Environmental Impact Statement. This section in paragraphs (a), (b), and (c) describes when the Responsible Official must prepare an environmental impact statement before making an implementing decision for a proposed stewardship action. In paragraph (a) the content and procedures for the preparation of an environmental impact statement are referenced to 40 CFR 1502. An environmental impact statement must

be prepared if the outcome of a proposed stewardship action is known or suspected to create a significant effect on the human environment or if it is otherwise desirable to prepare a statement. If the Responsible Official knows or suspects that implementation of a stewardship action may have a significant impact on the human environment, an environmental impact statement must be prepared.

Paragraph (b) states that an implementing decision for one or more stewardship actions described in an environmental impact statement must be documented in a record of decision. Except for special circumstances outlined in CEQ regulations at 40 CFR 1506.10(d), 1506.11, and 1502.9(c), a record of decision cannot be signed by the Responsible Official until 30 after the final environmental impact statement is made available to the public by the Environmental Protection Agency. The environmental impact statement and record of decision is integrated with one or more appropriate stewardship registers. The term, ''integrated with'' replaces ''appended to'' of the proposed procedures to more accurately communicate that a stewardship register is to be a part of the appropriate environmental document.

Paragraph (c) is revised to simplify the examples of when an environmental impact statement is normally prepared. The revised text reads. ''An environmental impact statement is normally required for the following implementing decisions:

(1) One or more stewardship actions that may be significant as described in 40 CFR 1508.27. Examples include, but are not limited to, long-term programs or plans for:

(A) Management of livestock grazing;

(B) Transportation;

(C) Management of forests and harvest of forest-related products; and

(D) Management of public recreation.

(2) Construction and operation of a visitor center with associated public access to the Preserve.

The implementing decisions for long-term plans described in (c)(1) are typically referred to as ''planning-related decisions''. These implementing decisions typically do not undertake specific actions on the ground, except for those that may modify one or more on-going stewardship actions. However, they are often critical choices in setting the stage, the expectations and bounds, for future stewardship actions and are intended to follow the depiction of federal actions that guide or prescribe alternative uses of federal resources upon which future agency action will be based as described in CEQ regulations at 40 CFR 1508.18(b)(2). Many people regard these planning-related decisions and their potentially significant consequences as paramount factors in the effective stewardship of natural resources. It is appropriate to consider the effects of these decisions before they are implemented.

101.52 Environmental Assessment. This section, in paragraphs (a) through (d), describes the format for preparation of an environmental assessment. Paragraph (e) lists the types of implementing decisions that are normally accompanied by environmental assessments prepared to aid their consideration by the Responsible Official and the public.

Paragraph (a) states that an environmental assessment is prepared by the Responsible Official to aid in determining whether to prepare an environmental impact statement, to prepare a finding of no significant impact, to otherwise aid compliance with NEPA, or to facilitate preparation of an environmental impact statement when one is necessary. This is an important aspect of NEPA procedures that is often overlooked or not well understood. The environmental assessment is a systematic means to review the consequences of a proposed stewardship action, consider reasonable alternatives to the proposal, and evaluate the overall consequences. Often, through public comment, dialog, and study of the proposal, substantial improvements in the proposal can be identified.

Paragraph (b) describes a very useful method to combine documents to reduce unwanted paperwork and improve overall effectiveness. An environmental assessment is combined with a stewardship register to create a concise document. The environmental analysis of a proposed stewardship action and alternatives is integrated with the applicable stewardship register as a combined document (40 CFR 1506.4).

The following paragraph, (c), describes a very important principle guiding the environmental review of a proposal. The purpose of the integrated information is to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal, which involves unresolved conflicts concerning alternative uses of available resources. The preceding sentence, similar to section 102 (E) of NEPA, is the basis for developing alternative means to meet the identified purpose and need for a proposed stewardship action. It is anticipated that the public will play a vital role in aiding the Trust in identifying reasonable alternatives to proposals.

Paragraph (d) states that the combined document includes a brief discussion of the purpose and need for the proposal, of alternatives, of the environmental impacts of the proposal and alternatives, and a listing of agencies and persons consulted. It is anticipated that the integration of these four items within the stewardship register will provide a very efficient and effective means to accomplish and record appropriate environmental reviews.

Section 101.52 concludes with paragraph (e) that describes the types of implementing decisions that are normally accompanied by an environmental assessment. A reviewer requested that the term, ''incidental ground disturbance'' be eliminated or defined in the text of the proposed procedures at (e)(1). The sentence at (e)(1) is replaced by following: ''Establishing or substantively revising a program or policy for the permitting of seasonal or short-term backcountry recreation or special use actions which could potentially create minor ground disturbance.''

101.53 Finding of No Significant Impact. This section of the procedures in paragraphs (a) and (b) describes the preparation and documentation of a finding that, based on the information in an environmental assessment, the Responsible Official determines that the proposed stewardship action will not have a significant impact on the human environment. Paragraph (a) states. ''If, based on the information in the combined document (101.52(d)), the Responsible Official determines that the environmental consequences of the proposal will not have a significant effect on the human environment, the finding and reasons for it must be stated in a finding of no significant impact.''

Paragraph (b) describes the content of a finding of no significant impact by stating that a finding of no significant impact is combined with the stewardship register and environmental assessment. The paragraph concludes with a statement that if such a finding cannot be made, or it is otherwise desirable, the Responsible Official may cancel, modify, or postpone the proposal while additional information is made available, or issue a notice of intent that an environmental impact statement will be prepared and considered.

Paragraphs (c) and (d) describe the content of a finding of no significant impact and the procedures for public review.

This section concludes with paragraph (e) that is a requirement that

the Responsible Official must use the factors of ''significantly'' as defined in 40 CFR 1508.27 for the determination that a proposal will have no significant effect on the human environment.

101.6 Categorical Exclusions. Reviewers offered several thoughtful comments regarding the description of categorical exclusions. Paragraphs (a), (b), and (c) are rewritten to respond to several of these comments to clarify the description of categorical exclusions.

The text in (a) is revised to read. ''In the absence of extraordinary circumstances, the Responsible Official may undertake the stewardship actions in (c) without preparation of an environmental document.

Paragraph (b) is revised to read. ''Extraordinary circumstances include, but are not limited to: Scientific controversy; high level of public interest; extreme weather or climatic conditions; or the potential for effects on environmental resources of critical concern such as cultural resource sites and habitat for candidate, endangered, or threatened species.

Paragraph (c) is rewritten to read. ''In the absence of extraordinary circumstances, the following stewardship actions may be undertaken, provided that no more than 1320 feet of road or trail construction is required to implement the stewardship action: * * *''. Based on reviewer comments to better quantify the categories listed in the proposed procedures, a requirement that the categorical exclusions may not include more than 1320 feet of road or trail construction is added. The list of categorical exclusions with the revisions made to improve the description and use of each category as well as correct minor errors follows:

''(1) Policy development, planning and implementation which relate to routine activities, such as personnel, organizational change, record management, internal communication, financial management, or similar administrative functions;

(2) Procurement of equipment and supplies consistent with federal environmental policies and direction;

(3) Closures or other orders issued for durations of less than one year to provide resource protection or to protect public health and safety;

(4) Location and maintenance of landline boundaries and geographic sites;

(5) Routine repair and maintenance of facilities and administrative sites including, but not limited to, buildings, fences, water systems, roads, trails, signs, and ancillary facilities associated with the administration and management of the Preserve, or the installation, and routine repair and maintenance of removable communication facilities of not more than 250 square feet, the primary purpose of which is to facilitate communication associated with the administration and management of the Preserve;

(6) Use and care for horses or other stock for administrative purposes that is clearly limited in context and intensity;

(7) Repair and maintenance of recreation sites;

(8) Reconstruction or maintenance of utilities within a designated corridor;

(9) Inventories, research activities, and studies, such as resource inventories and routine data collection when such actions are clearly limited in context and intensity;

(10) Implementation or modification of minor management practices such as the placement of salt blocks, temporary fencing, and the placement of temporary water tanks to improve range conditions and/or animal distribution;

(11) Treatment of forest structure and fuel conditions for the purpose of reducing the hazard of large, stand-replacing crown fires in areas where such high severity fires are outside an historic range of variability. Projects under this category are limited to an aggregate area in the Preserve of no more than 640 acres in a calendar year, and may involve prescribed fire and/or the removal of live trees, the diameter of which will be:

(A) No larger than nine inches at breast height; or

(B) Determined by publicly available site-specific size class information used to define an appropriate diameter and basal area distribution of trees to be removed;

(12) Removal of brush or hazard trees near roads or buildings, where such action is necessary to protect historic structures or the health and safety of the public and/or employees, and when such action is clearly limited in context and intensity; and

(13) Authorizing seasonal or short-term backcountry recreation or special use actions such as: Day-use hiking; wildlife observation; educational field trips; and other small group activities.''

101.7 Public Involvement. The procedures for engaging the public in the consideration of a proposed stewardship action are presented in paragraphs (a) through (f) of this section. Paragraph (a) states. ''Opportunities for the public to provide input and maintain a dialogue with the Trust regarding a proposed stewardship action may be triggered by a combination of notice through appropriate media, public meetings, targeted outreach, agency consultation, scoping, and public review of relevant documents.''

Paragraph (b) states that the Trust will identify the appropriate stages during the consideration of a proposed stewardship action, and for specific forms of public review and input to the Responsible Official. For stewardship actions involving natural and cultural resources of the Preserve, the Responsible Official will notify the public that the stewardship action is being proposed, and that a stewardship register is available for review. The Trust will take into account public input received at this stage of the proposal to help determine the appropriate goals, objectives, and performance requirements that will guide further development of the proposed stewardship action.

Paragraph (c) explains that the public's reaction to a proposed stewardship action will be ''taken fully into account'' in planning for the appropriate level of public involvement throughout the decisionmaking process. The term ''critical'' is replaced in the text by ''taken fully into account''. Based on reviewer comments, it is emphasized here that the Responsible Official should act on the comments received, not just consider the comments to be critical. The term ''throughout the rest of the NEPA process'' is replaced with ''throughout the decisionmaking process'' to emphasize that public reaction and comment is important in developing appropriate environmental evaluation and documentation as well as in the overall decisionmaking process of the Trust. The public's reaction to a proposal will also help determine the extent to which the Trust develops alternatives to a proposed action.

Paragraph (d) has the requirement that all proposed stewardship actions involving the lands, resources, and facilities of the Preserve will require authorization by the Board of Trustees at a public meeting, during which public comments will be recorded and considered.

Several comments were received regarding paragraph (e). Some reviewers said that the proposed procedures did specify an adequate time for review of an environmental assessment and that specific time periods should be set. Trust staff and others acknowledged that some flexibility is needed for pubic reviews based on the nature and extent of a proposed stewardship action. Paragraph (e) is reworded and an additional paragraph (f) is added to the text of this section. The text for (e) now reads. ''The Trust will provide a reasonable time period for public review

and comment on an environmental assessment based on the complexity and nature of the proposed stewardship action and public comment received.

Paragraph (f) is added to clarify necessary actions in emergency situations. Paragraph (f) states. ''If the Responsible Official determines that an emergency circumstance exists requiring immediate implementation of a proposal, the Chair of the Board of Trustees may reduce or eliminate the time period for public review and comment on an environmental assessment. If the Responsible Official proposes to respond to an emergency with an action that would normally require preparation of an environmental impact statement, the Chair of the Board of Trustees will immediately contact the Council on Environmental Quality to invoke the procedures under 40 CFR 1506.11.'' This addition to the procedures is intended to be responsive to the comments from reviewers and provide for needed response to an emergency.

101.8 Making and Recording an Implementing Decision. This section of the procedures contains three requirements in paragraphs (a), (b), and (c) regarding making and recording an implementing decision for a proposed stewardship action. The section begins with paragraph (a) that states the Responsible Official may make an implementing decision to authorize a stewardship action after completion of 101.5 and compliance with the listed conditions.

Paragraph (b) requires signature of the Responsible Official and date of the implementing decision.

Paragraph (c) has a provision for making minor corrections or adjustments to stewardship actions to improve efficiency, correct minor errors, or otherwise improve performance, if and only if, the three listed criteria are fulfilled.

101.9 Monitoring Outcomes and Considering New Information. This section describes the steps necessary to ensure that new information is considered and, if relevant to on-going or planned stewardship actions, appropriately acted upon by the Responsible Official. Paragraph (a) requires the Responsible Official to evaluate each monitored outcome identified in a stewardship register. As information from monitoring is obtained and interpreted, conclusions are to be recorded in the appropriate stewardship register by the responsible Trust staff.

Paragraph (b) is a requirement for the Responsible Official to consider new information and the influence that information may have upon on-going or completed stewardship actions.

101.10 The Comprehensive Management of the Preserve. To more accurately describe the contents of this section, the title is changed from ''Preparing and Approving the Comprehensive Management Program'' that appeared in the proposed procedures. This final section of the procedures is rewritten to more adequately describe the comprehensive management of the Preserve and the relationship of strategic guidance, the State of the Preserve, stewardship registers, and their roles in fostering adaptive management.

Paragraph (a) is changed to read. ''The comprehensive management of the lands, resources, and facilities of the Preserve includes all stewardship registers, the State of the Preserve, and the strategic guidance adopted by the Board of Trustees.'' These documents depict the management of the Preserve and provide timely references for interested citizens.''

Paragraph (b) as rewritten states. ''At least once every five years after August 2, 2002, the Board of Trustees must review the goals adopted in strategic guidance and the State of the Preserve. Based on the reviews of the goals and the State of the Preserve, the Board of Trustees may remove, amend, or continue the goals of the Preserve, and/or adopt one or more additional goals.'' Reviewers requested that the procedures establish a means to evaluate the long-term goals of strategic guidance and avoid altering goals without consideration of the overall natural and social environments within and adjacent to the Preserve. The requirement in (b) ensures that at least once every five years from the date the Board assumed management of the Preserve, the Board must review the goals of strategic guidance and the State of the Preserve before removing, amending, continuing, and/or adopting one or more additional goals.

Paragraph (c) is rewritten to read. ''The Board of Trustees may remove, amend, and/or adopt one or more additional goals only after completing reviews of the goals adopted in strategic guidance and a current State of the Preserve.'' This requirement is added to ensure that the Board may at any time add, amend, or remove one or more goals of strategic direction, but only after review of all goals and a current State of the Preserve. This requirement responds to requests to establish clear requirements that the long-term goals of strategic guidance receive careful consideration in a broad and comprehensive context before revision by the Board of Trustees.

Exhibit I Stewardship Register. This exhibit concludes the procedures. Minor changes are made in the description of the stewardship register. The description of the purpose and need is reworded to read. ''Concisely explain why the stewardship action is proposed and the goal(s) sought.'' This improvement was also made in the 101.2, Terminology, to point out that the purpose and need for a proposed stewardship action should include the one or more goals sought through the action proposed.

The description of the integrated environmental document is rewritten to read. ''Integrate the environmental document or, if a categorical exclusion is used, cite the category.'' This change is made based on reviewer comments to specifically cite the category if a categorical exclusion from the preparation of an environmental document is appropriate for the stewardship action under consideration.

The text of the procedures follows:

Valles Caldera Trust—National Environmental Policy Act Procedures for the Valles Caldera National Preserve

Contents

100 Authority and Purpose

100.1 Authority. The National Environmental Policy Act of 1969 (NEPA), Pub. L. 91–190, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977, CEQ regulations at 40 CFR parts 1500 though 1508, and

The Valles Caldera Preservation Act, Pub. L. 106–248.

100.2 Purpose. To implement the comprehensive management of the lands, resources, and facilities of the Valles Caldera National Preserve and achieve the purposes of NEPA, it is necessary and appropriate to establish these procedures. It is the intent of the Trust and managers of the Preserve to:

(a) Integrate the principles and requirements of NEPA with the planning and decisionmaking processes of the Trust;

(b) Implement these procedures to make the NEPA process more useful to decisionmakers and citizens by eliminating unwanted paperwork and utilizing a wide variety of means to gain understanding of the human environment and natural resources of the Preserve and communicate this to the public;

(c) Ensure that environmental information is readily available in a variety of useful forms to decisionmakers and citizens before decisions are made, and ensure that environmental information is utilized to guide adaptive management during and after actions are taken; and

(d) Adopt these procedures in supplement to the regulations at 40 CFR parts 1500 through 1508, referred to as the CEQ regulations for implementing the procedural provisions of the NEPA.

101 Integration of NEPA with Planning and Decisionmaking of the Trust

101.1 Purposes and Principles

(a) The findings of Congress (Public Law 106–248, Title I, section 102) describe the unique character of the Valles Caldera. The purposes for management of the Preserve and the management authorities of the Valles Caldera Trust are described in Title I, section 105 and section 106 of Public Law 106–248. The comprehensive management of the lands, resources, and facilities of the Preserve is achieved through strategic guidance and stewardship actions authorized by the Trust's Board of Trustees.

(b) Citizens play a vital role in the overall management, use, and enjoyment of the Preserve.

(c) Monitoring and evaluation of stewardship actions, research, and detailed studies provide the public and the Trust with the basis for adapting on-going and future stewardship actions to achieve the goals of the Trust and the requirements of NEPA.

(d) Stewardship of the Preserve addresses all programs of the Preserve with the recognition that the whole is greater than the sum of the parts. Management of the Preserve is guided by the following management principles describing the values of the Trust and vision adopted by Board of Trustees on December 13, 2001:

(1) We will administer the Preserve with the long view in mind, directing our efforts toward the benefit of future generations;

(2) Recognizing that the Preserve imparts a rich sense of place and qualities not to be found anywhere else, we commit ourselves to the protection of its ecological, cultural, and aesthetic integrity;

(3) We will strive to achieve a high level of integrity in our stewardship of the lands, programs, and other assets in our care. This includes adopting an ethic of financial thrift and discipline and exercising good business sense;

(4) We will exercise restraint in the implementation of all programs, basing them on sound science and adjusting them consistent with the principles of adaptive management;

(5) Recognizing the unique heritage of northern New Mexico's traditional cultures, we will be a good neighbor to surrounding communities, striving to avoid negative impacts from Preserve activities and to generate positive impacts;

(6) Recognizing the religious significance of the Preserve to Native Americans, the Trust bears a special responsibility to accommodate the religious practices of nearby tribes and pueblos, and to protect sites of special significance;

(7) Recognizing the importance of clear and open communication, we commit ourselves to maintaining a productive dialogue with those who would advance the purposes of the Preserve and, where appropriate, to developing partnerships with them;

(8) Recognizing that the Preserve is part of a larger ecological whole, we will cooperate with adjacent landowners and managers to achieve a healthy regional ecosystem;

(9) Recognizing the great potential of the Preserve for learning and inspiration, we will strive to integrate opportunities for research, reflection and education in the programs of the Preserve; and

(10) In providing opportunities to the public we will emphasize quality of experience over quantity of experiences. In so doing, while we reserve the right to limit participation or to maximize revenue in certain instances, we commit ourselves to providing fair and affordable access for all permitted activities.

101.2 Terminology

Adaptive Management. ''Adaptive management'' means adjusting stewardship actions or strategic guidance based on knowledge gained from new information, experience, experimentation, and monitoring results, and is the preferred method for managing complex natural systems.

Environmental documents. ''Environmental documents'' include the documents specified in 40 CFR 1508.9 (environmental assessment), 1508.11 (environmental impact statement), 1508.13 (finding of no significant impact), and 1508.22 (notice of intent).

Extraordinary circumstances. ''Extraordinary circumstances'' means conditions associated with a stewardship action that is normally categorically excluded and recognized as likely to create one or more outcomes that may significantly affect the human environment.

Finding of no significant impact. ''Finding of no significant impact'' means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (40 CFR 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (40 CFR 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference (40 CFR 1508.13).

Goal. ''Goal'' means a desirable condition of the Preserve sought by the Trust and/or a desirable condition as described in Public Law 106–248 or within the management principles adopted by the Trust (101.1(d)).

Human environment. ''Human environment'' has the same meaning as that described in the CEQ regulations for implementing the procedural provisions of the NEPA. ''Human Environment'' shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See definition of ''effects'' in 40 CFR 1508.8.) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental

impact statement will discuss all of these effects on the human environment.

Implementing decision. ''Implementing decision'' means the authorization by the Responsible Official to implement one or more stewardship actions.

Monitored outcome. ''Monitored outcome'' means the short-, mid-, or long-term outcome selected for systematic evaluation.

Objective. ''Objective'' means the desired outcome that can be meaningfully evaluated by location and timing within the Preserve.

Outcome. ''Outcome'' means the result or consequence of a stewardship action that can be meaningfully evaluated by location and time of occurrence. For purposes of these procedures, this term has the same meaning as impact or effect. For convenience in communication, ''outcomes'' may be beneficial or detrimental, and are grouped from their date of origin considering their anticipated duration as: Short-term, anticipated to occur over 0 to 3 years; mid-term, anticipated to occur over 3 to 10 years; and long-term, anticipated to occur for 10 years or longer.

Performance requirement. ''Performance requirement'' means the limitation placed on the implementation of a stewardship action necessary for compliance with applicable laws, regulations, standards, mitigating measures, or generally accepted practices.

Purpose and need. ''Purpose and need'' means a concise explanation why a stewardship action is being proposed and the goal(s) sought.

Responsible Official. ''Responsible Official'' means the Executive Director of the Trust and, consistent with delegated authority, the Preserve Manager and other Preserve staff, or the Chair of the Board of Trustees if specifically designated by the Board of Trustees.

State of the Preserve. ''State of the Preserve'' means a concise account of the systematic review of monitored outcomes and interpretive information from, but not limited to, observations, studies, public comment, research investigations, natural resources data or information summaries, and other sources to provide the technical and scientific basis for considering the cumulative effects of the past, present, and reasonably foreseeable future actions of the Trust.

Stewardship action. ''Stewardship action'' means an activity or group of activities consisting of at least one goal, objective, and performance requirement proposed or implemented by the Responsible Official that may:

(1) Guide or prescribe alternative uses of the Preserve upon which future implementing decisions will be based; or

(2) Utilize or manage the resources of the Preserve.

Stewardship register. ''Stewardship register'' means a concise document, including applicable environmental documents, available to the public and readily amended over time depicting the location, development, implementation, and monitoring of a stewardship action.

Strategic guidance. ''Strategic guidance'' means adoption by the Board of Trustees of one or more of the following elements:

(a) One or more goals for all or a portion of the Preserve; or

(b) Direction to the Responsible Official to consider one or more stewardship actions or an administrative matter related to the operation of the Preserve.

101.3 Overall Procedures

(a) The Trust achieves comprehensive management of the Preserve by adopting strategic guidance and selecting and implementing appropriate stewardship actions. It is the intent of the Trust to maintain open and collaborative working relationships among all interested and affected citizens, Tribal governments, federal and state agencies, and others during the consideration, implementation, and monitoring of all stewardship actions. Information regarding stewardship actions is recorded within stewardship registers that are available to the public in accordance with applicable law.

(b) The Responsible Official may propose a stewardship action only if it is consistent with strategic guidance and is accompanied by a clear statement of its purpose and need.

(c) Based on the known or suspected outcomes of a stewardship action, or for other reasons, the Responsible Official may prepare an environmental document to improve understanding and to assist in making an implementing decision. The outcomes of implemented stewardship actions are monitored to aid future choices, consistent with the adaptive management.

(d) The Trust must prepare the State of the Preserve at least once every five years after August 2, 2002. The State of the Preserve provides a technical and scientific basis for the comprehensive management of the Preserve and aids the consideration of goals within strategic guidance that may be adopted by the Board of Trustees

(e) The on-going review of monitored outcomes, public dialog, and the interpretation of evolving natural and social environments aids the Trust and others in the consideration of the purpose and need for necessary and appropriate stewardship actions within the Preserve. The overall procedures are intended to efficiently and effectively achieve the goals of the Trust and NEPA and eliminate unnecessary or redundant paperwork.

101.4 Proposing a Stewardship Action and Following its Progress

(a) When a stewardship action is proposed and its purpose and need is described by the Responsible Official and authorized for continued consideration by the Board of Trustees, the stewardship register (Exhibit I) will be made available to the public through appropriate media as soon as practicable and throughout the process, leading either to termination of the proposal or to an implementing decision. The stewardship register will also, as relevant, contain information regarding completion of the stewardship action and monitoring of one or more outcomes.

(b) The public and government officials are provided many opportunities to review the activities of the Trust. The Responsible Official will request public review and comment on a proposed stewardship action, its purpose and need, alternatives, and/or anticipated outcomes as described in 101.7. If comments are requested and received within the dates specified, the Responsible Official must consider the comments before making an implementing decision.

(c) As information in the stewardship register is amended, the date and nature of the change to the stewardship register and name of the person transcribing the amended information must be recorded to provide an accurate record. The Trust may prepare and use documents or appropriate electronic media depicting administrative operations to aid the planning, execution, and record keeping of stewardship actions or for other purposes.

(d) To further the purposes of the Trust and NEPA, the Executive Director of the Trust is responsible for overall review of agency NEPA compliance and preparation of any necessary environmental documents.

101.5 Environmental Evaluation and Documentation

(a) An environmental document must be prepared and considered before the Responsible Official can make an implementing decision unless a

stewardship action is within a categorical exclusion listed in 101.6.

(b) The Responsible Official, in the absence of extraordinary circumstances, may make an implementing decision without the preparation of an environmental document for those stewardship actions that do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect.

101.51 Environmental Impact Statement

(a) The Responsible Official must prepare and consider an environmental impact statement as described in 40 CFR 1502 if the outcome of a proposed stewardship action may create a significant impact on the human environment or it is otherwise desirable.

(b) An implementing decision for one or more stewardship actions under review in an environmental impact statement must be documented in a record of decision. Except for special circumstances described in CEQ regulations at 40 CFR 1502.9(c), 1506.10(d), and 1506.11, a record of decision cannot be signed by the Responsible Official until 30 days after the final environmental impact statement is made available to the public by the Environmental Protection Agency. The final environmental impact statement and record of decision, if completed, is integrated with one or more appropriate stewardship registers.

(c) An environmental impact statement is normally required for the following implementing decisions:

(1) One or more stewardship actions that may be significant as described in 40 CFR 1508.27. Examples include, but are not limited to, long-term programs or plans for:

(A) Management of livestock grazing;

(B) Transportation;

(C) Management of forests and harvest of forest-related products; and

(D) Management of public recreation.

(2) Construction and operation of a visitor center with associated public access to the Preserve.

101.52 Environmental Assessment

(a) An environmental assessment is prepared by the Responsible Official to aid in determining whether to prepare an environmental impact statement, to prepare a finding of no significant impact, to otherwise aid compliance with NEPA, or to facilitate preparation of an environmental impact statement when one is necessary.

(b) The environmental assessment of one or more stewardship actions is combined with one or more relevant stewardship registers to create a concise document or set of documents that describe one or more stewardship actions and alternatives that meet the identified purpose and need. The environmental analysis of the proposed stewardship action and alternatives is integrated with one or more stewardship registers (40 CFR 1506.4).

(c) The purpose of the integrated information is to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal, which involves unresolved conflicts concerning alternative uses of available resources.

(d) The combined document includes a brief discussion of the purpose and need for the proposal, of alternatives, of the environmental impacts of the proposal and alternatives, and a listing of agencies and persons consulted.

(e) The following stewardship actions within the Preserve and authorized by the Responsible Official in an implementing decision are normally accompanied by an environmental assessment:

(1) Establishing or substantively revising a program or policy for the permitting of seasonal or short-term backcountry recreation or special use actions which could potentially create minor ground disturbance;

(2) Establishing an integrated program of scientific investigations utilizing land, resources, and facilities of the Preserve where the effects of performing the investigations within the Preserve are anticipated to be short-term and minor in scope;

(3) Livestock management actions utilizing land, resources, and facilities of the Preserve, defined in location and time, the effects of which are anticipated to be short-term and minor in scope.

(4) Forest treatments, which may include the removal of trees or managed fire, designed to establish or enhance stand characteristic trends toward or into an historic range of variability affecting a clearly defined segment of the forested land or a specified forest type within the Preserve; and

(5) Reconstruction, repair, and use of roadways and trails, and construction of minor trail segments within the Preserve which are not anticipated to significantly alter the magnitude and frequency of anticipated use.

101.53 Finding of No Significant Impact

(a) If, based on the information in the combined document (101.52(d)), the Responsible Official determines that the environmental consequences of the proposal will not have a significant effect on the human environment, the finding and reasons for it must be stated in a finding of no significant impact (FONSI).

(b) A FONSI is combined with the stewardship register and environmental assessment. If such a finding cannot be made, or it is otherwise desirable, the Responsible Official may cancel, modify, or postpone the proposal while additional information is made available, or issue a notice of intent that an environmental impact statement will be prepared and considered.

(c) The FONSI itself need not be detailed, but must succinctly state the reason for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include or attach and incorporate by reference, the environmental assessment.

(d) The Responsible Official may seek public review of a FONSI before making an implementing decision. In some circumstances, the Responsible Official must make the FONSI available for public review (including state and area-wide clearinghouses) for 30 days before the Responsible Official makes a final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(1) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the Trust's procedures; or

(2) The nature of the proposed action is one without precedent.

(e) The Responsible Official must use the factors of ''significantly'' as described in 40 CFR 1508.27 for the determination that a proposal will have no significant impact on the human environment.

101.6 Categorical Exclusions

(a) In the absence of extraordinary circumstances, the Responsible Official may undertake the stewardship actions in (c) without preparation of an environmental document.

(b) Extraordinary circumstances include, but are not limited to: Scientific controversy; high level of public interest; extreme weather or climatic conditions; or the potential for effects on environmental resources of critical concern such as cultural resource sites and habitat for candidate, endangered, or threatened species.

(c) In the absence of extraordinary circumstances, the following stewardship actions may be undertaken,

provided that no more than 1320 feet of road or trail construction is required to implement the stewardship action:

(1) Policy development, planning and implementation which relate to routine activities, such as personnel, organizational change, record management, internal communication, financial management, or similar administrative functions;

(2) Procurement of equipment and supplies consistent with federal environmental policies and direction;

(3) Closures or other orders issued for durations of less than one year to provide resource protection or to protect public health and safety;

(4) Location and maintenance of landline boundaries and geographic sites;

(5) Routine repair and maintenance of facilities and administrative sites including, but not limited to, buildings, fences, water systems, roads, trails, signs, and ancillary facilities associated with the administration and management of the Preserve, or the installation, and routine repair and maintenance of removable communication facilities of not more than 250 square feet, the primary purpose of which is to facilitate communication associated with the administration and management of the Preserve;

(6) Use and care for horses or other stock for administrative purposes that is clearly limited in context and intensity;

(7) Repair and maintenance of recreation sites;

(8) Reconstruction or maintenance of utilities within a designated corridor;

(9) Inventories, research activities, and studies, such as resource inventories and routine data collection when such actions are clearly limited in context and intensity;

(10) Implementation or modification of minor management practices such as the placement of salt blocks, temporary fencing, and the placement of temporary water tanks to improve range conditions and/or animal distribution;

(11) Treatment of forest structure and fuel conditions for the purpose of reducing the hazard of large, stand-replacing crown fires in areas where such high severity fires are outside an historic range of variability. Projects under this category are limited to an aggregate area in the Preserve of no more than 640 acres in a calendar year, and may involve prescribed fire and/or the removal of live trees, the diameter of which will be:

(A) No larger than nine inches at breast height; or

(B) Determined by publicly available site-specific size class information used to define an appropriate diameter and basal area distribution of trees to be removed;

(12) Removal of brush or hazard trees near roads or buildings, where such action is necessary to protect historic structures or the health and safety of the public and/or employees, and when such action is clearly limited in context and intensity; and

(13) Authorizing seasonal or short-term backcountry recreation or special use actions such as: Day-use hiking; wildlife observation; educational field trips; and other small group activities.

101.7 Public Involvement.

(a) Opportunities for the public to provide input and maintain a dialogue with the Trust regarding a proposed stewardship action may be triggered by a combination of notice through appropriate media, public meetings, targeted outreach, agency consultation, scoping, and public review of relevant documents.

(b) In the preparation of a stewardship register, the Trust will identify the appropriate stages during the process leading up to a decision, and if the decision is to go forward with an action, the implementation of that decision, where specific forms of public review and input will be most useful and informative to the Responsible Official.

(1) For stewardship actions involving natural and cultural resources of the Preserve, the Responsible Official will notify the public that the stewardship action is being proposed, and that a stewardship register is available for review.

(2) The Trust will take into account public input received at this stage of the proposal to help determine the appropriate goals, objectives, and performance requirements that will guide further development of the proposed stewardship action.

(c) The public's reaction to a proposed stewardship action will be taken fully into account in planning for the appropriate level of public involvement throughout the decisionmaking process. The public's reaction will also help determine the extent to which the Trust develops alternatives to the proposed action.

(d) All proposed stewardship actions involving the management of the lands, resources, and facilities of the Preserve will require authorization by the Board of Trustees at a public meeting, during which public comments will be considered and recorded.

(e) The Trust will provide a reasonable time period for public review and comment on an environmental assessment based on the complexity and nature of the proposed stewardship action and public comment received.

(f) If the Responsible Official determines that an emergency circumstance exists requiring immediate implementation of a proposal, the Chair of the Board of Trustees may reduce or eliminate the time period for public review and comment on an environmental assessment. If the Responsible Official proposes to respond to an emergency with an action that would normally require preparation of an environmental impact statement, the Chair of the Board of Trustees will immediately contact the Council on Environmental Quality to invoke the procedures under 40 CFR 1506.11.

101.8 Making and Recording an Implementing Decision

(a) The Responsible Official may make an implementing decision to authorize a stewardship action after completion of 101.5, if and only if:

(1) The available information regarding the purpose and need for the proposal and the anticipated outcomes are suitable; and

(2) At least one monitored outcome is identified in the stewardship register.

(b) The implementing decision must be recorded in the stewardship register by signature of the Responsible Official and dated.

(c) After an implementing decision for one or more stewardship actions is made, minor corrections or adjustments to the stewardship action to improve efficiency, correct minor errors, or otherwise improve performance may be made by the responsible Trust staff, if and only if:

(1) The corrections or adjustments do not significantly alter the nature or extent of the stewardship action or its goals, objectives, or performance requirements;

(2) The anticipated consequences of the stewardship action remain essentially the same as those described in the relevant environmental documents; and

(3) Such minor corrections or adjustments are recorded in the appropriate stewardship register as described in 101.4(c).

101.9 Monitoring Outcomes and Considering New Information

(a) The Responsible Official must evaluate each monitored outcome identified in the stewardship register. As information from monitoring is obtained and interpreted, conclusions are to be recorded in the appropriate stewardship register by the responsible Trust staff.

(b) If, based on monitoring conclusions or other new information available to the Responsible Official, the observed outcomes of stewardship actions described in one or more stewardship registers as amended differ significantly from those anticipated or if new information has a meaningful bearing on the anticipated consequences of one or more stewardship actions, the Responsible Official must consider such information and:

(1) Consider the preparation or supplementation of an environmental document as described in 101.5 and CEQ regulations;

(2) If appropriate, propose a stewardship action and/or continue, modify, or terminate one or more stewardship actions as described in 101.4; and

(3) Appropriately, amend the stewardship register to incorporate the new information and/or change to the stewardship action or description of consequences in the relevant environmental document.

101.10 The Comprehensive Management of the Preserve

(a) The comprehensive management of the lands, resources, and facilities of the Preserve includes all stewardship registers, the State of the Preserve, and the strategic guidance adopted by the Board of Trustees. These documents depict the management of the Preserve and provide timely references for interested citizens.

(b) At least once every five years after August 2, 2002, the Board of Trustees must review the goals adopted in strategic guidance and the State of the Preserve. Based on the reviews of the goals and the State of the Preserve, the Board of Trustees may remove, amend, or continue the goals of the Preserve, and/or adopt one or more additional goals.

(c) The Board of Trustees may remove, amend, and/or adopt one or more additional goals only after completing reviews of the goals adopted in strategic guidance and a current State of the Preserve.

Exhibit I— Stewardship Register

Descriptive name of Stewardship
File Number:
Target Start Date:
Actual Start Date:
Target Completion Date:
Actual Completion Date:
Location: Identify the location of the stewardship action in the Preserve in a readily accessible and understandable form.

Purpose and Need: Concisely explain why the stewardship action is proposed and the goal(s) sought.

Description: Describe the stewardship action and, through appropriate media, describe the related physical, biological, social, and/or economic environment.

Objective: Describe the desired outcome of the stewardship action in measurable terms including, but not limited to, anticipated quantity, location, and timing.

Performance Requirements: List the performance requirements needed to guide or limit resource use in accomplishment of the objective. A checklist may be used.

Integrate the environmental document or, if a categorical exclusion is used, cite the category.

Agencies and Persons Consulted:
Signature of Responsible Official:
Date Authorized:

Monitored Outcomes: List one or more outcomes that will be meaningfully evaluated after implementation of the stewardship action. Describe the nature, size, and location of each monitored outcome anticipated to occur in the short-, mid-, and/or long-term.

Evaluation of Monitoring Information: As information from monitoring is evaluated, describe conclusions and any new information as guided by 101.7(b).

Dated: July 11, 2003.

William deBuys,

Chairman, Valles Caldera Trust.

[FR Doc. 03–18080 Filed 7–16–03; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on the Readjustment of Veterans, Notice of Meeting

The Department of Veterans Affairs gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on the Readjustment of Veterans will be held Wednesday, July 23, through Friday, July 25, 2003, in Anchorage, Alaska. The meeting sessions will begin at 8 a.m. and adjourn by 5 p.m. on all three days.

The Committee's mandate is to review the post-military readjustment needs of veterans and to assess the availability and quality of VA's programs for meeting these needs.The purpose of the meeting is to provide the Committee with an opportunity to tour local VA facilities and to engage in fact finding discussions with local VA service providers and veterans.

The meeting on July 23 will be conducted in two locations, Fairbanks and Kenai. The Committee will be divided into two subgroups for this purpose. One group will travel to Fairbanks to review the community-based operations of the local Vet Center and to meet with local veterans. A second group will travel to Kenai to review Vet Center operations at that location and meet with local veterans.

The meeting on July 24 will be conducted at the Anchorage Vet Center. The day's agenda will include a tour of the facilities, program briefings provided by VA staff from the Vet Center and the Outpatient Clinic, and meetings with local veterans and veterans service organization representatives.

The July 25 session will be conducted primarily at the VA Outpatient Clinic featuring presentations by VA service providers and military staff from the Family Support Services Center at Elmendorf Air Force Base. The day's agenda will also include an open forum community meeting at the VA Outpatient Clinic from 10 to 11:30 a.m. This meeting will provide the Committee members an opportunity to meet with local veteran stakeholders, veteran service representatives and other local community leaders.

The sessions on Wednesday, Thursday and most of Friday will be closed to the public in accordance with the provisions of 5 U.S.C., 552b(c)(6) pursuant to subsection 10(d) of the Federal Advisory Committee Act. During those sessions, the Committee will be engaging in discussions with clinical service providers and veterans. The discussions will disclose information of a personal nature to veteran patients, which would constitute a clearly unwarranted invasion of personal privacy. The open forum community meeting on Friday from 10 to 11:30 a.m. at the VA Outpatient Clinic will be open to the public. The VA Outpatient Clinic is located at 2925 DeBarr Road, Anchorage, Alaska 99508.

Those who plan to attend or have questions concerning the meeting may contact Mr. Charles M. Flora, M.S.W., Readjustment Counseling Service, Department of Veterans Affairs Central Office, at (202) 273–8969. Written statements for the Committee meeting record may be forwarded to Mr. Flora up to 10 days following the meeting.

Dated: July 2, 2003.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Office.

[FR Doc. 03–18116 Filed 7–16–03; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 68, No. 137

Thursday, July 17, 2003

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596–AC04

Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska

Correction

In the issue of Tuesday, July 15, 2003, make the following correction:

In the Table of Contents, on page IV, in the first column, under the heading ''**Forest Service**'', under the subheading ''**PROPOSED RULES**'', in the fifth line, ''Roadless area conservation; Tongass National Park, AK'' should read, ''Roadless area conservation; Tongass National Forest, AK''.

[FR Doc. C3–17420 Filed 7–16–03; 8:45 am]

BILLING CODE 1505–01–D

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Notice

Correction

In notice document 03–17749 appearing on page 41369 in the issue of Friday, July 11, 2003, make the following correction:

In the third column, in the TIME AND DATE section, add ''July 21, 2003 ''.

[FR Doc. C3–17749 Filed 7–16–03; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Thursday,
July 17, 2003

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m); Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–108639–99]

RINs 1545–AX26, 1545–AX43

Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that would provide guidance for certain retirement plans containing cash or deferred arrangements under section 401(k) and providing for matching contributions or employee contributions under section 401(m). These regulations affect sponsors of plans that contain cash or deferred arrangements or provide for employee or matching contributions, and participants in these plans. This document also contains a notice of public hearing on these proposed regulations.

DATES: Written and electronic comments and requests to speak (with outlines of oral comments) at a public hearing scheduled for November 12, 2003, must be received by October 22, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG–108639–99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:RU (REG–108639–99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site at: *www.irs.gov/regs.* The public hearing will be held in the IRS Auditorium (7th Floor), Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, R. Lisa Mojiri-Azad or John T. Ricotta at (202) 622–6060 (not a toll-free number); concerning submissions and the hearing, and/or to be placed on the building access list to attend the hearing, Lanita Van Dyke, (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP Washington, DC 20224. Comments on the collections of information should be received by September 15, 2003. Comments are specifically requested concerning:

Whether the proposed collections of information are necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collections of information in these proposed regulations are contained in §§ 1.401(k)–1(d)(3)(iii)(C), 1.401(k)–2(b)(3), 1.401(k)–3(d), 1.401(k)–3(f), 1.401(k)–3(g), 1.401(k)–4(d)(3), 1.401(m)–3(e), 1.401(m)–3(g) and 1.401(m)–3(h). The information required by §§ 1.401(k)–3(d), 1.401(k)–3(f), 1.401(k)–3(g), 1.401(m)–3(e), 1.401(m)–3(g) and 1.401(m)–3(h) is required by the IRS to comply with the requirements of sections 401(k)(12)(D) and 401(m)(11)(A)(ii) regarding notices that must be provided to eligible participants to apprize them of their rights and obligations under certain plans. This information will be used by participants to determine whether to participate in the plan, and by the IRS to confirm that the plan complies with applicable qualification requirements to avoid adverse tax consequences. The information required by § 1.401(k)–4(d)(3) is required by the IRS to comply with the requirements of section 401(k)(11)(B)(iii)(II) regarding notices that must be provided to eligible participants to apprize them of their rights and obligations under certain plans. This information will be used by participants to determine whether to participate in the plan, and by the IRS to confirm that the plan complies with applicable qualification requirements to avoid adverse tax consequences. The information required by § 1.401(k)–2(b)(3) will be used by employees to file their income tax returns and by the IRS to assess the correct amount of tax. The information provided under § 1.40(k)–1(d)(3)(iii)(C) will be used by employers in determining whether to make hardship distributions to participants. The collections of information are mandatory. The respondents are businesses or other for-profit institutions, and nonprofit institutions.

Estimated total annual reporting burden: 26,500 hours.

The estimated annual burden per respondent is 1 hour, 10 minutes.

Estimated number of respondents: 22,500.

The estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed new comprehensive regulations setting forth the requirements (including the nondiscrimination requirements) for cash or deferred arrangements under section 401(k) and for matching contributions and employee contributions under section 401(m) of the Internal Revenue Code (Code).

Comprehensive final regulations under sections 401(k) and 401(m) of the Code were last published in the **Federal Register** in TD 8357 (published August 9, 1991) and TD 8376 (published December 2, 1991) and amended by TD 8581 published on December 22, 1994. Since 1994, many significant changes have been made to sections 401(k) and 401(m) by the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1755) (SBJPA), the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788) (TRA '97), and the Economic Growth and Tax Relief

Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (EGTRRA).

The most substantial changes to the section 401(k) and section 401(m) provisions were made to the methodology for testing the amount of elective contributions, matching contributions, and employee contributions for nondiscrimination. Section 401(a)(4) prohibits discrimination in contribution or benefits in favor of highly compensated employees (within the meaning of section 414(q)) (HCEs). Section 401(k) provides a special nondiscrimination test for elective contributions under a cash or deferred arrangement that is part of a profit-sharing plan, stock bonus plan, pre-ERISA money purchase plan, or rural cooperative plan, called the actual deferral percentage (ADP) test. Section 401(m) provides a parallel test for matching contributions and employee contributions under a defined contribution plan, called the actual contribution percentage (ACP) test. These special nondiscrimination standards are provided in recognition of the fact that the amount of elective contributions and employee contributions (and corresponding matching contributions) is determined by the employee's utilization of the contribution opportunity offered under the plan. This is in contrast to the situation in other defined contribution plans where the amount of contributions is determined by the amount the employer decides to contribute.

Sections 401(k) and 401(m) provide alternative methods for satisfying the applicable nondiscrimination rules: a mathematical comparison and a number of design-based methods. The inherent variation in the amount of contributions among employees noted above, and the fact that the economic situation of HCEs may make them more likely to make elective or employee contributions, means that the usual nondiscrimination test under section 401(a)(4)—under which for each HCE with a contribution level there must be a specified number of nonhighly compensated employees (NHCEs) with equal or greater contributions—is not appropriate. Instead, average rates of contribution are used in the ADP and ACP tests (with a built-in differential permitted for HCEs) and minimum standards for nonelective or matching contributions are provided in the design-based alternatives.

Prior to the enactment of SBJPA, sections 401(k) and 401(m) provided only for mathematical comparison. Specifically, the ADP and ACP tests compare the average of the rates of contributions of the HCEs to the average of the rates of contributions of the NHCEs. For this purpose, the rate of contributions for an employee is the amount of contributions for an employee divided by the employee's compensation for the plan year. These tests are satisfied if the average rate of HCE contributions does not exceed 1.25 times the average rate of contributions of the NHCEs. Alternatively, these tests are satisfied if the average rate of HCE contributions does not exceed the average rate of contributions of the NHCEs by more than 2 percentage points and is no more than 2 times the average rate of contributions of the NHCEs. To the extent that these tests are not satisfied, the statute provides for correction through distribution to HCEs (or forfeiture of nonvested matching contributions) or, to the extent provided in regulations, recharacterization of elective contributions as after-tax contributions. In addition, to the extent provided in regulations, nonelective contributions can be made to NHCEs and elective contributions and certain matching contributions can be moved between the ADP and ACP tests, in order to reduce the discrepancy between the average rates of contribution for the HCEs and the NHCEs.

SBJPA added design-based alternative methods of satisfying the ADP and ACP tests. Under these methods, if a plan meets certain contribution and notice requirements, the plan is deemed to satisfy the nondiscrimination rules without regard to actual utilization of the contribution opportunity offered under the plan. These regulations reflect this change and the other changes that were made to sections 401(k) and 401(m) under SBJPA, TRA '97 and EGTRRA since the issuance of final regulations under those sections.

SBJPA made the following significant changes affecting section 401(k) and section 401(m) plans:

- The ADP test and ACP test were amended to allow the use of prior year data for NHCEs.
- The method of distributing to correct failures of the ADP test or ACP test was changed to require distribution to the HCEs with the highest contributions.
- Tax-exempt organizations and Indian tribal governments are permitted to maintain section 401(k) plans.
- A safe harbor alternative to the ADP test and ACP test was introduced in order to provide a design-based method to satisfy the nondiscrimination tests.
- The SIMPLE 401(k) plan (an alternative design-based method to satisfy the nondiscrimination tests for small employers that corresponds to the provisions of section 408(p) for SIMPLE IRA plans by providing for smaller contributions) was added.
- A special testing option was provided for plans that permit participation before employees meet the minimum age and service requirements, in order to encourage employers to permit employees to start participating sooner.

TRA '97 made the following significant changes affecting section 401(k) and section 401(m) plans:

- State and local governmental plans are treated as automatically satisfying the ADP and ACP tests.
- Matching contributions for self-employed individuals are no longer treated as elective contributions.

EGTRRA made the following significant changes affecting section 401(k) and section 401(m) plans:

- Catch-up contributions were added to provide for additional elective contributions for participants age 50 or older.
- The Secretary was directed to change the section 401(k) regulations to shorten the period of time that an employee is stopped from making elective contributions under the safe harbor rules for hardship distributions.
- Beginning in 2006, section 401(k) plans will be permitted to allow employees to designate their elective contributions as ''Roth contributions'' that will be subject to taxation under the rules applicable to Roth IRAs under section 408A.
- Section 401(k) plans using the design-based safe harbor and providing no additional contributions in a year are exempted from the top-heavy rules of section 416.
- Distributions from section 401(k) plans are permitted upon ''severance from employment'' rather than ''separation from service.''
- The multiple use test specified in section 401(m)(9) is repealed.
- Faster vesting is required for matching contributions.
- Matching contributions are taken into account in satisfying the top-heavy requirements of section 416.

In addition, since publication of the final regulations, a number of items of guidance affecting section 401(k) and section 401(m) plans addressing these statutory changes and other items have been issued by the IRS, including:

- Notice 97–2 (1997–1 C.B. 348) provided initial guidance on prior year ADP and ACP testing and guidance on correction of excess contributions and excess aggregate contributions, including distribution to the HCEs with the highest contributions.
- Rev. Proc. 97–9 (1997–1 C.B. 624) provided model amendments for SIMPLE 401(k) plans.

• Notice 98–1 (1998–1 C.B. 327) provided additional guidance on prior year testing issues.

• Notice 98–52 (1998–2 C.B. 632) and Notice 2000–3 (2000–1 C.B. 413) provided guidance on safe harbor section 401(k) plans.

• Rev. Rul. 2000–8 (2000–1 C.B. 617) addressed the use of automatic enrollment features in section 401(k) plans.

• Notice 2001–56 (2001–2 C.B. 277) and Notice 2002–4 (2002–2 I.R.B. 298) provided initial guidance related to the changes made by EGTRRA.

These items of guidance are incorporated into these proposed regulations with some modifications and the proposed regulations have been reorganized as indicated in the tables of contents at proposed §§ 1.401(k)–0 and 1.401(m)–0. Treasury and the IRS believe that a single restatement of the section 401(k) and section 401(m) rules serves the interests of plan sponsors, third-party administrators, plan participants, and plan beneficiaries.

The process of reviewing and integrating all existing administrative guidance under sections 401(k) and 401(m) has led Treasury and the IRS to reconsider certain rules and to propose certain changes in those rules. To the extent practicable, this preamble identifies the substantive changes and explains the underlying analysis. In many cases, the changes will clarify or simplify existing guidance and will reduce plan administrative burdens.

Treasury and the IRS appreciate the fact that plan sponsors and third-party administrators have developed systems and practices in the application of existing administrative guidance to the design and operation of section 401(k) and section 401(m) plans. In many cases, the details of these systems and practices have been determined through a plan sponsor's or administrator's interpretation of specific terms in existing guidance or, where no guidance has been provided, through a plan sponsor's or administrator's best legal and practical judgment. As a result, these systems and practices may differ from administrator to administrator, from sponsor to sponsor, or from plan to plan.

Treasury and the IRS also recognize that certain of the substantive changes in these proposed regulations will require changes in plan design or plan operation. However, the proposed regulations are not otherwise intended to require significant changes in plan systems and practices that were developed under existing guidance and that conform to the requirements of sections 401(k) and 401(m). Therefore, Treasury and the IRS specifically request that plan sponsors and third-party administrators comment on points where the proposed regulations might have the unintended effect of requiring a change to plan systems or practices so that Treasury and the IRS can further evaluate whether such a change is in fact appropriate or whether Treasury and the IRS should instead make an adjustment in the final regulations.

Explanation of Provisions

1. Rules Applicable to All Cash or Deferred Arrangements

Section 401(k)(1) provides that a profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan will not fail to qualify under section 401(a) merely because it contains a qualified cash or deferred arrangement. Section 1.401(k)–1 would set forth the general definition of a cash or deferred arrangement (CODA), the additional requirements that a CODA must satisfy in order to be a qualified CODA, and the treatment of contributions made under a qualified or nonqualified CODA.

As under the existing final regulations, a CODA is defined as an arrangement under which employees can make a cash or deferred election with respect to contributions to, or accruals or benefits under, a plan intended to satisfy the requirements of section 401(a). A cash or deferred election is any direct or indirect election by an employee (or modification of an earlier election) to have the employer either: (1) Provide an amount to the employee in the form of cash or some other taxable benefit that is not currently available; or (2) contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation. A cash or deferred election can include a salary reduction agreement, but the specific reference to a salary reduction agreement has been eliminated as unnecessary. In addition, the proposed regulations would incorporate prior guidance on automatic enrollment, and thus would reflect the fact that a CODA can specify that the default that applies in the absence of an affirmative election by an employee can be a contribution to a trust, as described in Rev. Rul. 2000–8.[1]

The proposed regulations would continue to provide that the definition of a CODA excludes contributions that are treated as after-tax employee contributions at the time of the contribution and contributions made pursuant to certain one-time irrevocable elections, but would also specify that a CODA does not include an arrangement under which dividends paid to an ESOP are either distributed to a participant or reinvested in employer securities in the ESOP pursuant to an election by the participant or beneficiary under section 404(k)(2)(A)(iii) as added by EGTRRA.

The proposed regulations would also specify that a contribution is made pursuant to a cash or deferred election only if the contribution is made after the election is made. Thus, a contribution made in anticipation of an employee's election is not treated as an elective contribution. Similarly, the regulations would provide that a contribution is made pursuant to a cash or deferred election only if the contribution is made after the employee's performance of services which relate to the compensation that, but for the election, would be paid to the employee. (If the payment of compensation would have preceded the performance of services, a contribution made no earlier than the date the compensation would have been paid, but for the election, is also treated as made pursuant to a cash or deferred election). Accordingly, amounts contributed in anticipation of future performance of services generally would not be treated as elective contributions under section 401(k). These restrictions on the timing of contributions are consistent with the fundamental premise of elective contributions, that these are contributions that are paid to the plan as a result of an employee election not to receive those amounts in cash. Moreover, ensuring that contributions are made after the employee's election furthers plan administrability.

The deductibility of these prefunded elective contributions (as well as prefunded matching contributions) for the taxable year in which the contribution was made was addressed in Notice 2002–48 (2002–29 I.R.B.139). In that notice, the IRS indicated that it was reviewing issues other than the deductibility of prefunded contributions but, pending additional guidance,

[1] The Department of Labor has advised Treasury and the IRS that, under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), fiduciaries of a plan must ensure that the plan is administered prudently and solely in the interest of plan participants and beneficiaries. While ERISA section 404(c) may serve to relieve certain fiduciaries from liability when participants or beneficiaries exercise control over the assets in their individual accounts, the Department of Labor has taken the position that a participant or beneficiary will not be considered to have exercised control when the participant or beneficiary is merely apprised of investments that will be made on his or her behalf in the absence of instructions to the contrary. *See* 29 CFR 2550.404c–1 and 57 FR 46924.

would not challenge the deductibility of the contributions provided actual payment is made during the taxable year for which the deduction is claimed and the amount deducted does not exceed the applicable limit under section 404(a)(3)(A)(i). After considering this issue, the IRS and Treasury have concluded that the prefunding of elective contributions and matching contributions is inconsistent with sections 401(k) and 401(m). Thus, under these proposed regulations, an employer would not be able to prefund elective contributions to accelerate the deduction for elective contributions. Once these regulations are finalized, employer contributions made under the facts in Notice 2002–48 would no longer be permitted to be taken into account under the ADP test or the ACP test and would not satisfy any plan requirement to provide elective contributions or matching contributions.

2. Qualified CODAs

A. General Rules Relating to Qualified CODAs

Elective contributions under a qualified CODA are treated as employer contributions and generally are not included in the employee's gross income at the time the cash would have been received (but for the cash or deferred election), or at the time contributed to the plan. Elective contributions under a qualified CODA are included in the employee's gross income however, if the contributions are in excess of the section 402(g) limit for a year, are designated Roth contributions (under section 402A, effective for tax years beginning after December 31, 2005) or are recharacterized as after-tax contributions as part of a correction of an ADP test failure.

A CODA is not qualified unless it is part of a profit sharing plan, stock bonus plan, pre-ERISA money purchase plan, or rural cooperative plan and provides for an election between contributions to the plan or payments directly in cash. In addition, a CODA is not qualified unless it meets the following requirements: (1) The elective contributions under the CODA satisfy either the ADP test set forth in section 401(k)(3) or one of the design-based alternatives in section 401(k)(11) or (12); (2) elective contributions under the CODA are nonforfeitable at all times; (3) elective contributions are distributable only on the occurrence of certain events, including attainment of age 59½, hardship, death, disability, severance from employment, or termination of the plan; (4) the group of employees eligible to participate in the CODA satisfies the coverage requirements of section 410(b)(1); (5) no other benefit (other than matching contributions or another specified benefit) is conditioned, directly or indirectly, upon the employee's making or not making elective contributions under the CODA; and (6) no more than 1 year of service is required for eligibility to elect to make a cash or deferred election.

Subject to certain exceptions, State and local governmental plans are not allowed to include a qualified CODA. Plans sponsored by Indian tribal governments and rural cooperatives are allowed to include a qualified CODA.

B. Nondiscrimination Rules Applicable to CODAs

As under the existing regulations, the proposed regulations would provide that the special nondiscrimination standards set forth in section 401(k) are the exclusive means by which a qualified CODA can satisfy the nondiscrimination in amount of contribution requirement of section 401(a)(4). These special nondiscrimination standards now include: the ADP test, the ADP safe harbor and the SIMPLE 401(k) plan. Pursuant to section 401(k)(3)(G), a State or local governmental plan is deemed to satisfy the ADP test.

In addition, as under existing regulations, the plan must satisfy the requirements of § 1.401(a)(4)–4 with respect to the nondiscriminatory availability of benefits, rights and features, including the availability of each level of elective contributions, matching contributions, and after-tax employee contributions. The provisions of the existing regulations related to compliance with sections 410(b) and 401(a)(4) would be revised to clarify the relationship of the rules under sections 410(b) and 401(a)(4) to the requirements for a qualified CODA and to remove redundant provisions. Except as provided below, however, these rules are substantively unchanged.

These proposed regulations are designed to provide simple, practical rules that accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ADP for NHCEs (which is used as a benchmark for testing the ADP for HCEs) or to otherwise manipulate the nondiscrimination testing requirements of section 401(k). Further, these nondiscrimination requirements are part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of section 401(k) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ADP so as to increase significantly the permitted ADP for HCEs, or otherwise manipulate the nondiscrimination rules of section 401(k), if a principal purpose of the changes was to achieve such a result.

C. Aggregation and Disaggregation of Plans

The proposed regulations would consolidate the rules in the existing regulations regarding identification of CODAs and plans for purposes of demonstrating compliance with the requirements of section 401(k). As under the existing regulations, all CODAs included in a plan are treated as a single CODA for purposes of applying the nondiscrimination tests. For this purpose, a plan is generally defined by reference to § 1.410(b)–7(a) and (b) after application of the mandatory disaggregation rules of § 1.410(b)–7(c) (other than the mandatory disaggregation of section 401(k) and section 401(m) plans) and permissive aggregation rules of § 1.410(b)–7(d), as modified under these regulations. For example, if a plan covers collectively bargained employees and noncollectively bargained employees, the elective contributions for the separate groups of employees must be subject to separate nondiscrimination tests under section 401(k). The proposed regulations would also retain the special rules in the existing regulations that permit the aggregation of certain employees in different collective bargaining units and the prohibition on restructuring under § 1.401(a)(4)–9(c).

The proposed regulations would change the treatment of a CODA under a plan which includes an ESOP. Section 1.410(b)–7(c)(2) provides that the portion of a plan that is an ESOP and the portion that is not an ESOP are treated as separate plans for purposes of section 410(b) (except as provided in § 54.4975–11(e)). Accordingly, under the existing regulations, such a plan must apply two separate nondiscrimination tests: one for elective contributions going into the ESOP portion (and invested in employer stock) and one for elective contributions going in the non-ESOP portion of the plan. The additional testing results in increased expense and administrative difficulty for the plan and creates the possibility that the ESOP portion or the non-ESOP portion may fail the ADP test or ACP test because HCEs may be more

or less likely to invest in employer securities than NHCEs.

Since the issuance of the existing regulations, the use of an ESOP as the employer stock fund in a section 401(k) plan has become much more widespread. In light of this development, the proposed regulations would eliminate disaggregation of the ESOP and non-ESOP portions of a single section 414(l) plan for purposes of ADP testing. The same rule would apply for ACP testing under section 401(m). In addition, the proposed regulations would provide that, for purposes of applying the ADP test or the ACP test, an employer could permissively aggregate two section 414(l) plans, one that is an ESOP and one that is not.

However, the exception to mandatory disaggregation of ESOPs from non-ESOPs set forth in these proposed regulations would not apply for purposes of satisfying section 410(b). Accordingly, the group of eligible employees under the ESOP and non-ESOP portions of the plan must still separately satisfy the requirements of sections 401(a)(4) and 410(b).

The proposed regulations would also provide that a single testing method must apply to all CODAs under a plan. This has the effect of restricting an employer's ability to aggregate section 414(l) plans for purposes of section 410(b), if those plans apply inconsistent testing methods. For example, a plan that applies the ADP test of section 401(k)(3) may not be aggregated with a plan that uses the ADP safe harbor of section 401(k)(12) for purposes of section 410(b).

D. Restrictions on Withdrawals

As discussed above, a qualified CODA must provide that elective contributions may only be distributed after certain events, including hardship and severance from employment. EGTRRA amended section 401(k)(2)(B)(i)(I) by replacing ''separation from service'' with ''severance from employment.'' This change eliminated the ''same desk rule'' as a standard for distributions under section 401(k) plans.

In addition, EGTRRA amended Code section 401(k)(10) by deleting disposition by a corporation of substantially all of the assets of a trade or business and disposition of a corporation's interest in a subsidiary, leaving termination of the plan as the only distributable event described in section 401(k)(10). Finally, EGTRRA directs the Secretary of the Treasury to revise the regulations relating to distributions under section 401(k)(2)(B)(i)(IV) to provide that the period during which an employee is prohibited from making elective and employee contributions following a hardship distribution is 6 months (instead of 12 months as required under § 1.401(k)–1(d)(2)(iv)(B)(4) of the existing regulations).[2]

Notice 2001–56 and Notice 2002–4 provided guidance on these EGTRRA changes to the distribution rules for elective contributions. That guidance is incorporated in these proposed regulations. In connection with the change to severance from employment, comments are requested on whether a change in status from employee to leased employee described in section 414(n) should be treated as a severance from employment that would permit a distribution to be made. In addition, the proposed regulations do not include reference to ''retirement'' (included in the existing regulation) as an event allowing distribution because retirement is not listed in the statute, and is subsumed by severance from employment.

In addition to the statutory changes, the rules relating to hardship distributions have been reorganized in order to clarify certain ambiguities, including the relationship between the generally applicable rules, employee representations, and the safe harbors provided under the existing regulations. The existing regulations set forth two basic requirements (*i.e.*, the employee has an immediate and heavy financial need and the distribution is necessary to satisfy that need) followed by safe harbor provisions. The proposed regulations would retain those basic requirements, but would clarify that each safe harbor is separately applicable to each basic requirement. In addition, the proposed regulations would provide that an employee representation used for purposes of determining that a distribution is necessary to satisfy an immediate and heavy financial need must provide that the need cannot reasonably be relieved by any available distribution or nontaxable plan loan (even if the distribution or loan would not be sufficient to satisfy the financial need), but need not provide that a loan from a commercial source will be taken if no such loan in an amount sufficient to satisfy the need is available on reasonable commercial terms.

The proposed regulations would also modify the existing regulations to add other types of defined contribution plans to the list of plans that an employer may maintain after the termination of the plan that contains the qualified CODA while still providing for distribution of elective contributions upon plan termination. The list of such plans has been expanded to include not only an ESOP and a SEP, but also a SIMPLE IRA plan, a plan or contract that satisfies section 403(b) and a section 457 plan.

Finally, under the existing regulations, a plan that receives a plan-to-plan transfer that includes elective contributions, QNECs, or QMACs, must provide that the restrictions on withdrawals continue after the transfer. These proposed regulations would also make explicit a requirement that the transferor plan will fail to comply with the restrictions on withdrawals if it transfers elective contributions, QNECs, or QMACs to a plan that does not provide for these restrictions. However, a transferor plan will not fail to comply with this requirement if it reasonably concludes that the transferee plan provides for restrictions on withdrawals. What constitutes a basis for a reasonable conclusion would be comparable to the rules related to acceptance of rollover distributions. *See* § 1.401(a)(31)–1, A–14.

E. Other Rules for Qualified CODAs

The proposed regulations would generally retain the additional requirements set forth in the existing regulations that a CODA must satisfy in order to be qualified, with some modifications. First, in order to be a qualified CODA the arrangement must provide an employee with an effective opportunity to elect to receive the amount in cash no less than once during the plan year. Under the proposed regulations, whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including notice of the availability of the election, the period of time before the cash is currently available during which an election may be made, and any other conditions on elections.

The proposed regulations would also provide that a plan must provide for satisfaction of one of the specific nondiscrimination alternatives described in section 401(k). As with the existing regulations, the plan may accomplish this by incorporating by reference the ADP test of section 401(k)(3) and the regulations under proposed § 1.401(k)–2, if that is the nondiscrimination alternative being

[2] Under section 402(c), as amended by the IRS Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 685), and EGTRRA, a hardship distribution is not an eligible rollover distribution. While the change affects distributions from a section 401(k) plan, there is not specific reference to the change in these proposed regulations because these regulations are under sections 401(k) and 401(m).

used. If, with respect to the nondiscrimination alternative being used there are optional choices, the plan must provide which of the optional choices will apply. For example, a plan that uses the ADP test of section 401(k)(3) must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ADP for eligible NHCEs for the first plan year is 3% or the ADP for the eligible NHCEs for the first plan year. Similarly, a plan that uses the safe harbor method must specify whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution and is not permitted to provide that ADP testing will be used if the requirements for the safe harbor are not satisfied. The safe harbors are intended to provide employees with a minimum threshold in benefits in exchange for easier compliance for the plan sponsor. It would be inconsistent with this approach to providing benefits to allow an employer to deliver smaller benefits to NHCEs and revert to testing.

The proposed regulations would retain the existing rules relating to the section 401(k)(4)(A) prohibition on having benefits (other than a match) contingent on making or not making an elective contribution. However, the proposed regulations would specify that, in the case of a benefit that requires an amount to be withheld from an employee's pay, an employer is not violating the section 401(k)(4)(A) contingent benefit rule merely because the CODA restricts elective contributions to amounts available after such withholding from the employee's pay (after deduction of all applicable income and employment taxes). In addition, these proposed regulations also reflect the amendment to section 416(c)(2)(A) under which matching contributions can be taken into account for purposes of satisfying the top-heavy minimum contribution requirement without violating the prohibition on making benefits contingent on making or not making elective contributions.

To reflect the amendment of section 401(k)(4)(B) by SBJPA to allow tax exempt organizations to maintain section 401(k) plans, the proposed regulations would also eliminate the provision prohibiting a tax-exempt employer from adopting a section 401(k) plan.

As under the existing final regulations, these proposed regulations would provide that a partnership is permitted to maintain a CODA, and individual partners are permitted to make cash or deferred elections with respect to compensation attributable to services rendered to the entity, under the same rules that apply to common-law employees. This rule has been extended to sole proprietors. The provisions of these regulations also reflect the enactment of section 402(g)(8) (initially section 402(g)(9) as enacted by TRA '97) providing that matching contributions with respect to partners and sole proprietors are no longer treated as elective contributions.

3. Nonqualified CODAs

The proposed regulations would generally retain the rules in the existing regulations applicable to a nonqualified CODA (*i.e.*, a CODA that fails one or more of the applicable requirements to be a qualified CODA). Because elective contributions under such an arrangement are not entitled to the constructive receipt relief set forth in section 402(e)(3), the contributions are currently taxable to the employee. In addition, the plan to which such contributions are made must satisfy any nondiscrimination requirements that would otherwise apply under section 401(a)(4).

4. The Actual Deferral Percentage (ADP) Test

A. General Rules Relating to the ADP Test

Section 1.401(k)–2 sets forth the rules for a CODA that is applying the ADP test contained in section 401(k)(3). Under the ADP test, the percentage of compensation deferred for the eligible HCEs is compared annually to the percentage of compensation deferred for eligible NHCEs, and if certain limits are exceeded by the HCEs, corrective action must be taken by the plan. Correction can be made through the distribution of excess contributions, the recharacterization of excess contributions, or the contribution of additional employer contributions.

Section 401(k)(3)(A), as amended by SBJPA, generally provides for the use of prior year data in determining the ADP of NHCEs, while current year data is used for HCEs. This testing option is referred to as the prior year testing method. Alternatively, a plan may provide for the use of current year data for determining the ADPs for both NHCEs and HCEs, which is known as the current year testing method. The proposed regulations would use the term applicable year to describe the year for which the ADP is determined for the NHCEs.

Section 401(k)(3)(F), as added by SBJPA, provides that a plan benefitting otherwise excludable employees and that, pursuant to section 410(b)(4)(B), is being treated as two separate plans for purposes of section 410(b), is permitted to disregard NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A). Thus, the proposed regulations would permit such a plan to perform the ADP test by comparing the ADP for all eligible HCEs for the plan year and the ADP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A). The proposed regulations treat this rule as permissive. Accordingly, the new statutory provision does not eliminate the existing testing option under which a plan benefitting otherwise excludable employees is disaggregated into separate plans where the ADP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A).

B. Elective Contributions Used in the ADP Test

The proposed regulations would generally follow the existing regulations in defining which elective contributions are reflected in the ADP test and which ones are not. The proposed regulations would reflect the rule contained in the regulations under section 414(v), under which catch-up contributions that are in excess of a statutory limit or an employer-provided limit are not taken into account under the ADP test. See § 1.414(v). In addition, the proposed regulations would incorporate the rule in § 1.402(g)–1 that provides excess deferrals that are distributed are still taken into account under the ADP test (with the exception of deferrals made by NHCEs that were in violation of section 401(a)(30)). The proposed regulations retain the rule that elective contributions must be paid to the trust within 12 months after the end of the plan year. However, for plans subject to Title I of ERISA, contributions must be paid to the trust much sooner in order to satisfy the Department of Labor's regulations relating to when elective contributions become plan assets.

Section 401(k)(3) provides that the actual deferral ratio (ADR) of an HCE who is eligible to participate in 2 or more CODAs of the same employer is calculated by treating all CODAs in which the employee is eligible to participate as one CODA. The existing regulations implement this rule by aggregating the elective contributions of

such an HCE for all plan years that end with or within a single calendar year. This can yield an inappropriate result if the plan years are different, because more than 12 months of elective contributions could be included in an employee's ADR. These proposed regulations would modify this rule to provide that the ADR for each HCE participating in more than one CODA is determined by aggregating the HCE's elective contributions that are within the plan year of the CODA being tested. In addition, the definition of period of participation for purposes of determining compensation would be modified to take into account periods of participation under another plan where the elective contributions must be aggregated for an HCE. As a result, even in the case of plans with different plan years, each of the employer's CODAs will use 12 months of elective contributions and 12 months of compensation in determining the ADR for an HCE who participates in multiple arrangements.

The proposed regulations would retain the rule in the existing regulations that provides that the HCE aggregation of elective contributions under CODAs does not apply where the CODAs are within plans that cannot be aggregated under § 1.410(b)–7(d), but only after applying the modifications to the section 410(b) aggregation and disaggregation rules for section 401(k) plans provided in the proposed regulations. The non-application of the HCE aggregation rule would have less significance in light of the change described above relating to the elimination of the required disaggregation of ESOP and non-ESOP plans. In addition, the proposed regulations would clarify that, in determining whether two plans could be aggregated for this purpose, the prohibition on aggregating plans with CODAs that apply inconsistent testing methods set forth under these proposed regulations and the section 410(b) prohibition on aggregating plans that have different plan years would not apply.

C. Additional Employer Contributions Used in the ADP Test

The proposed regulations would generally retain the rules in the existing regulations permitting a plan to take qualified nonelective contributions or qualified matching contributions (*i.e.*, nonelective or matching contributions that satisfy the vesting and distribution limitations of section 401(k)(2)(B) and (C)) into account under the ADP test, except as described below. Thus, an employer whose CODA has failed the ADP test can correct this failure by making additional qualified nonelective contributions (QNECs) or qualified matching contributions (QMACs) for its NHCEs. The proposed regulations would no longer describe such contributions as being treated as elective contributions under the arrangement, but would nonetheless permit such contributions to be taken into account under the ADP test.

As under the existing regulations, these proposed regulations would provide that QNECs must satisfy four requirements in addition to the vesting and distribution rules described above before they can be taken into account under the ADP test: (1) The amount of nonelective contributions, including the QNECs that are used under the ADP test or the ACP test, must satisfy section 401(a)(4); (2) the nonelective contributions, excluding the QNECs that are used under the ADP test or the ACP test, must satisfy section 401(a)(4); (3) the plan to which the QNEC or QMAC is made must be a plan that can be aggregated with the plan maintaining the CODA; and (4) the QNECs or QMACs must not be contingent on the performance of services after the allocation date and must be contributed within 12 months after the end of the plan year within which the contribution is to be allocated.[3] Thus, in the case of a plan using prior year ADP testing, any QNECs that are to be allocated to the NHCEs for the prior plan year must be contributed before the last day of the current plan year in order to be taken into account.

Some plans provide a correction mechanism for a failed ADP test that targets QNECs to certain NHCEs in order to reduce the total contributions to NHCEs under the correction. Under the method that minimizes the total QNECs allocated to NHCEs under the correction, the employer makes a QNEC to the extent permitted by the section 415 limits to the NHCE with the lowest compensation during the year in order to raise that NHCE's ADR. If the plan still fails to pass the ADP test, the employer continues expanding the group of NHCEs who receive QNECs to the next lowest-paid NHCE until the ADP test is satisfied. By using this bottom-up leveling technique, the employer can pass the ADP test by contributing small amounts of money to NHCEs who have very low compensation for the plan year (for example, an employee who terminated employment in early January with $300 of compensation). This is because of the fact that the ADP test is based on an unweighted average of ADRs and a small dollar (but high percentage of compensation) contribution to a terminated or other partial-year employee has a larger impact on the ADP test than a more significant contribution to a full-year employee.

The IRS and Treasury have been concerned that, by using these types of techniques, employers may pass the ADP test by making high percentage QNECs to a small number of employees with low compensation rather than providing contributions to a broader group of NHCEs. In addition, the legislative history to EGTRRA expresses Congressional intent that the Secretary of the Treasury will use his existing authority to address situations where qualified nonelective contributions are targeted to certain participants with lower compensation in order to increase the ADP of the NHCEs. (*See* EGTRRA Conference Report, H.R. Conf. Rep. 107–84, 240).

Accordingly, the proposed regulations would add a new requirement that a QNEC must satisfy in order to be taken into account under the ADP test. This requirement, designed to limit the use of targeted QNECs, would generally treat a plan as providing impermissibly targeted QNECs if less than half of all NHCEs are receiving QNECs and would also treat a QNEC as impermissibly targeted if the contribution is more than double the QNECs other nonhighly compensated employees are receiving, when expressed as a percentage of compensation. However, QNECs that do not exceed 5% of compensation are never treated as targeted and would always satisfy the new requirement.

This restriction on targeting QNECs would be implemented in the proposed regulations by providing that a QNEC that exceeds 5% of compensation could be taken into account for the ADP test only to the extent the contribution, when expressed as a percentage of compensation, does not exceed two times the plan's representative contribution rate. The plan's representative contribution rate would be defined as the lowest contribution rate among a group of NHCEs that is half of all the eligible NHCEs under the arrangement (or the lowest contribution rate among all eligible NHCEs under the arrangement who are employed on the last day of the year, if greater). For purposes of determining an NHCE's contribution rate, the employee's qualified nonelective contributions and

[3] With respect to this timing requirement, it should be noted that in order to be taken into account for purposes of section 415(c) for a limitation year, the contributions will need to be made no later than 30 days after the end of the section 404(a)(6) period applicable to the taxable year with or within which the limitation year ends.

the qualified matching contributions taken into account under the ADP test for the plan year are added together and the sum is divided by the employee's compensation for the same period. The proposed regulations under section 401(m) would provide parallel restrictions on QNECs taken into account in ACP testing, and a QNEC cannot be taken into account under both the ADP and ACP test (including for purposes of determining the representative contribution rate). As discussed more fully below, the proposed regulations would also have a limitation on targeting matching contributions, which would limit the extent to which QMACs can be targeted as a means of avoiding the restrictions on targeted QNECs.

The proposed regulations would also implement a prohibition against double counting of QNECs that was set forth in Notice 98–1. Generally, QNECs used in an ADP or ACP test, used to satisfy the safe harbor under section 401(k), or under a SIMPLE 401(k) plan can not be used again to demonstrate compliance with another test under section 401(k)(3) or 401(m)(2). For example, double counting could arise when QNECs on behalf of NHCEs are used to determine the ADP under current year testing in year 1 and then, if the employer elected prior year testing, are used again in year 2 to determine the ADP of NHCEs. However, unlike Notice 98–1, these proposed regulations would not contain the additional limitations on double counting elective contributions or matching contributions that were moved between the ADP and ACP tests.

D. Correction

Section 401(k)(8)(C), as amended by the SBJPA, provides that, for purposes of correcting a plan's failure to meet the nondiscrimination requirements of section 401(k)(3), distribution of excess contributions is made on the basis of the amount of the contributions by, or on behalf of, each HCE. The proposed regulations would implement this correction procedure in the same manner as set forth in Notice 97–2. Thus, the total amount of excess contributions is determined using the rules under the existing final regulations (*i.e.*, based on high percentages). Then that total amount is apportioned among the HCEs by assigning the excess to be distributed first to those HCEs who have the greatest dollar amount of contributions taken into account under the ADP test (as opposed to the highest deferral percentage). If these amounts are distributed or recharacterized in accordance with these regulations, the plan complies with the ADP test for the plan year with no obligation to recalculate the ADP test.

The proposed regulations would provide a special rule for correcting through distribution of excess contributions in the case of an HCE who participates in multiple plans with CODAs. In that case, the proposed regulations would provide that, for purposes of determining which HCE will be apportioned a share of the total excess contributions to be distributed from a plan, all contributions in CODAs in which such an HCE participates are aggregated and the HCE with the highest dollar amount of contributions will apportioned excess contributions first. However, only actual contributions under the plan undergoing correction—rather than all contributions taken into account in calculating the employee's ADR—may be distributed from a plan. If the high dollar HCE's actual contributions under the plan are insufficient to allow full correction, then the HCE with the next highest dollar amount of contributions is apportioned the remaining excess contributions. If additional correction is needed, this process is repeated until the excess contributions are completely apportioned. This correction mechanism is applied independently to each CODA in which the HCE participates. If correction is needed in more than one CODA, the ADRs of HCEs who have received corrective distributions under the other arrangements are not recalculated after correction in the first plan.

The proposed regulations would generally follow the rules in the existing regulations on the determination of net income attributable to excess contributions. The existing regulations provide for a reasonable determination of net income attributable to an excess contribution, but do not specify which contribution within the plan year is to be treated as the excess contribution to be distributed. This provision would be retained in the proposed regulations along with the existing alternative method of determining the net income, which approximates the result that would apply if the excess contribution is made on the first day of the plan year. However, to the extent the employee is or will be credited with allocable gain or loss on those excess contributions for the period after the end of the plan year (the gap period), the proposed regulations would now require that income be determined for that period. As under the existing regulations, the determination of the income for the gap period could be based on the income determined using the alternative method for the aggregate of the plan year and the gap period or using 10% of the income for the plan year (determined under the alternative method) for each month in the gap period.

The proposed regulations would permit the recharacterization of excess contributions in a manner that generally follows the existing regulations. However, the year the employee must include the recharacterized contribution in current income has been changed to match the year that the employee would have had to include the excess contribution in income, had it been distributed. Thus, if the recharacterized amount is less than $100, it is included in gross income in the year that it is recharacterized, rather than the year of the earliest elective contributions for the employee.

The proposed regulations would retain the rules in the existing regulations regarding the timing and tax treatment of distributions of excess contributions, coordination with the distribution of excess deferrals and the treatment of matches attributable to excess contributions.

E. Special Rules Relating to Prior Year Testing

The proposed regulations would generally follow the rules set forth in Notice 98–1 regarding prior year testing, including the limitations on switching from current year testing to prior year testing. However, the proposed regulations would provide that a plan is permitted to be inconsistent between the choice of current year testing method and prior year testing method, as applied for ADP purposes and ACP purposes. In such a case, any movement of elective contributions or QMACs between the ADP and ACP tests (including recharacterization) would be prohibited.

The proposed regulations would generally incorporate the rules set forth in Notice 98–1 relating to plan coverage changes in the case of a plan using prior year testing. Thus, in the case of a plan that uses prior year testing and experiences a plan coverage change affecting more than 10% of the NHCEs, the ADP of the NHCEs would generally be determined as the weighted average of the ADP of the NHCEs of the plans in which the NHCEs participated in the prior year. The definition of plan coverage change includes changes in the group of eligible employees under a plan resulting from the establishment or amendment of a plan, a plan merger or spin-off or a change in the way plans are combined or separated under the section 410(b) rules. The definition under the proposed regulations would

also include a reclassification of a substantial group of employees that has the same effect as amending the plan. These proposed regulations retain the rule that a plan that experiences coverage changes affecting 10% or less of the NHCEs disregards those changes in calculating the ADP for the NHCEs. Similarly, a plan that merely experiences a spin-off is not required to recalculate the ADP for the NHCEs.

5. Safe Harbor Section 401(k) Plans

Section 401(k)(12) provides a design-based safe harbor method under which a CODA is treated as satisfying the ADP test if the arrangement meets certain contribution and notice requirements. Section 1.401(k)–3 of these proposed regulations, which sets forth the requirements for these arrangements, generally follows the rules set forth in Notice 98–52 and Notice 2000–3. Thus, a plan satisfies the section 401(k) safe harbor if it makes specified QMACs for all eligible NHCEs. The matching contributions can be under a basic matching formula that provides for QMACs equal to 100% of the first 3% of elective contributions and 50% of the next 2% or an enhanced matching formula that is at least as generous in the aggregate, provided the rate of matching contributions under the enhanced matching formula does not increase as the employee's rate of elective contributions increases. In lieu of QMACs, the plan is permitted to provide QNECs equal to 3% of compensation for all eligible NHCEs. In addition, notice must be provided to each eligible employee, within a reasonable time before the beginning of the year, of their right to defer under the plan.

A plan using the safe harbor method must also comply with certain other requirements. Among these is the requirement in section 401(k)(12)(B)(ii) that provides that the rate of matching contribution for any elective contribution on the part of any HCE cannot exceed the rate of matching contribution that would apply to any NHCE with the same rate of elective contribution. Notice 98–52 advised that the general rules on aggregating contributions for HCEs eligible under more than one CODA would apply for this purpose. The IRS and Treasury have determined that such aggregation is not applicable under the ADP safe harbor. Accordingly, these proposed regulations would not require that elective or matching contributions on behalf of an HCE who is eligible to participate in more than one plan of the same employer be aggregated for purposes of the requirement of section 401(k)(12)(B)(ii). Thus, the rate of match for purposes of determining whether an HCE has a higher matching rate is based only on matching contributions with respect to elective contributions under the safe harbor plan. However, for an employer that uses the safe harbor method of satisfying the ACP test, the rule in Notice 98–52 is retained for applying the ACP safe harbor, with an exception for nonsimultaneous participation (as discussed in connection with the ACP safe harbor below).

These proposed regulations do not provide any rules relating to suspension of employee contributions under a plan that provides that safe harbor matching contributions are made with respect to the sum of elective contributions and employee contributions. Although Notice 2000–3 specifically permitted suspension of employee contributions in certain circumstances, the IRS and Treasury have determined that there are no limits on suspending employee contributions, provided that safe harbor matching contributions are made with respect to elective contributions. This is because the restrictions on suspension of elective contributions are sufficient to ensure an eligible NHCE can get the full matching contribution.

The proposed regulations do not include any exception to the requirements for safe harbor matching contributions with respect to catch-up contributions. Treasury and the IRS are aware that there are questions concerning the extent to which catch up contributions are required to be matched under a plan that provides for safe harbor matching contributions. Treasury and the IRS are interested in comments on the specific circumstances under which elective contributions by a NHCE to a safe harbor plan would be less than the amount required to be matched, *e.g.*, less than 5% of safe harbor compensation, but would be treated by the plan as catch-up contributions, and on the extent to which a safe harbor plan should be required to match catch-up contributions under such circumstances.

Section 401(k)(12)(D) contains a requirement that each eligible employee be provided with a notice of the employee's rights and obligations under the plan. These proposed regulations do not address the extent to which the notice can be provided through electronic media. As noted in the preamble to other regulations, the IRS and the Treasury Department are considering the extent to which the notice described in section 401(k)(12)(D), as well as other notices under the various Internal Revenue Code requirements relating to qualified retirement plans, can be provided electronically, taking into account the effect of the Electronic Signatures in Global and National Commerce Act (E–SIGN), Public Law 106–229 (114 Stat. 464 (2000)). The IRS and the Treasury Department anticipate issuing proposed regulations regarding these issues, and invite comments on these issues. Until those proposed regulations are issued, plan administrators and employers may continue to rely on the interim guidance in Q&A–7 of Notice 2000–3 on use of electronic media to satisfy the notice requirement in section 401(k)(12)(D).

These proposed regulations would clarify that a section 401(k) safe harbor plan must generally be adopted before the beginning of the plan year and be maintained throughout a full 12-month plan year. This requirement is consistent with the notion that the statute specifies a certain contribution level for nonhighly compensated employees in order to be deemed to pass the nondiscrimination requirements. If the contribution level is not maintained for a full 12-month year, the employer contributions made on behalf of nonhighly compensated employees should not support what could be a full year's contribution by the highly compensated employees.

The proposed regulations would adopt the exception to the requirement that a section 401(k) safe harbor plan be in place before the beginning of the plan year that was provided in Notice 2000–3. Under that option, an employer could adopt a section 401(k) safe harbor plan which has contingent non-elective contributions, provided the employer notifies employees of this contingent arrangement before the start of the year, amends the plan to provide the nonelective contributions no less than 30 days before the end of the year, and provides employees with a follow-up notice if the contribution will be made. Similarly, the proposed regulations would adopt the exception for a section 401(k) safe harbor plan that uses the matching contribution alternative. Under that exception, an employer can amend the plan to eliminate matching contributions with respect to future elective deferrals, provided that the matching contributions are made with respect to pre-amendment elective deferrals, employees are provided with notice of the change and the opportunity to change their elections, and the plan satisfies the ADP or ACP test for the plan year using the current year testing method.

The proposed regulations would recognize the practical difficulty in a 12-

month requirement by following the rule in Notice 98–52 that allowed a short plan year in the first plan year and would allow a short plan year in certain other circumstances. Specifically, a section 401(k) safe harbor plan could have a short plan year in the year the plan terminates, if the plan termination is in connection with a merger or acquisition involving the employer, or the employer incurs a substantial business hardship comparable to a substantial business hardship described in section 412(d). In addition, a section 401(k) safe harbor plan could have a short plan year if the plan terminates, the employer makes the safe harbor contributions for the short year, employees are provided notice of the change, and the plan passes the ADP test. Finally, a safe harbor plan could have a short plan year if it is preceded and followed by 12-month plan years as a section 401(k) safe harbor plan.

Under section 401(k)(12)(F), safe harbor contributions are permitted to be made to a plan other than the plan that contains the CODA. These proposed regulations reflect that rule and provide that the plan to which the safe harbor contributions are made need not be a plan that can be aggregated with the plan that contains the cash or deferred arrangement.

Whether a contribution is taken into account for purposes of the safe harbor is determined in accordance with the rules regarding inclusion in ADP testing under proposed § 1.401(k)–2(a). Thus, for example, a plan that provides for safe harbor matching contributions in 2006 need not provide for a matching contribution with respect to an elective contribution made during the first 2½ months of 2007 and attributable to service during 2006, unless that elective contribution is taken into account for 2006.

6. SIMPLE 401(k) Plans

Pursuant to section 401(k)(11), a SIMPLE 401(k) plan is treated as satisfying the requirements of section 401(k)(3)(A)(ii) if the contribution, vesting, notice and exclusive plan requirements of section 401(k)(11) are satisfied. Section 1.401(k)–4 of these proposed regulations reflects the provisions of section 401(k)(11) in a manner that follows the positions reflected in the model amendments set forth in Rev. Proc. 97–9.

7. Matching Contributions and Employee Contributions

Section 401(m)(2) sets forth a nondiscrimination test, the ACP test, with respect to matching contributions and employee contributions that is parallel to the nondiscrimination test for elective contributions set forth in section 401(k). Section 1.401(m)–1 of the proposed regulations would set forth this test in a manner that is consistent with the nondiscrimination test set forth in proposed § 1.401(k)–1(b). Thus, satisfaction of the ACP test, the ACP safe harbor or the SIMPLE 401(k) provisions of the proposed regulations under section 401(k) are the exclusive means that matching contributions and employee contributions can use to satisfy the nondiscrimination in amount of contribution requirements of section 401(a)(4). An anti-abuse provision comparable to that provided in connection with the proposed regulations under section 401(k) limits the ability of an employer to make repeated changes in plan provisions or testing procedures that have the effect of distorting the ACP so as to increase significantly the permitted ACP for HCEs, or otherwise manipulate the nondiscrimination rules of section 401(m), if a principal purpose of the changes was to achieve such a result.

These proposed regulations also include provisions regarding plan aggregation and disaggregation that are similar to those proposed for CODAs under section 401(k). For example, matching contributions made under the portion of a plan that is an ESOP and the portion of the same plan that is not an ESOP would not be disaggregated under these proposed regulations.

The definitions of matching contribution and employee contribution under § 1.401(m)–1 of the proposed regulations would generally follow the definitions in the existing regulations. Thus, whether an employer contribution is on account of an elective deferral or employee contribution—and thus is a matching contribution—is determined based on all the relevant facts and circumstances. However, the proposed regulations would provide that a contribution would not be treated as a matching contribution on account of an elective deferral if it is contributed before the employee's performance of services with respect to which the elective deferral is made (or when the cash that is subject to the cash or deferred election would be currently available, if earlier) and an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution. Thus, under these regulations, an employer would not be able to prefund matching contributions to accelerate the deduction for those contributions and, as noted above with respect to the timing of elective contributions, employer contributions made under the facts in Notice 2002–48 would not be taken into account under the ACP test and would not satisfy any plan requirement to provide matching contributions.

8. ACP Test for Matching Contributions and Employee Contributions

Section 1.401(m)–2 of the proposed regulations would provide rules for the ACP test that generally parallel the rules applicable to the ADP test in proposed § 1.401(k)–2. Thus, for example, the ACP test may be run by comparing the ACP for eligible HCEs for the current year with the ACP for eligible NHCEs for either the current plan year or the prior plan year. Similarly, the proposed regulations reflect the special ACP testing rule in section 401(m)(5)(C) for a plan that provides for early participation, comparable to the special ADP testing rule in section 401(k)(3)(F), as set forth in proposed § 1.401(k)–2(a)(1)(iii).

The determination of the actual contribution ratio (ACR) for an eligible employee, and the contributions that are taken into account in determining that ACR, under these proposed regulations are comparable to the rules under the proposed section 401(k) regulations. Thus, for example, the ACR for an HCE who has matching contributions or employee contributions under two or more plans is determined by adding together matching contributions and employee contributions under all plans of the employer during the plan year of the plan being tested, in a manner comparable to that for determining the ADR of an HCE who participates in two or more CODAs.

The proposed regulations would retain the rule from the existing regulations under which a QMAC that is taken into account in the ADP test is excluded from the ACP test. In addition, the proposed regulations would continue to allow QNECs to be taken into account for ACP testing, but would provide essentially the same restrictions on targeting QNECs to a small number of NHCEs as is provided in proposed § 1.401(k)–2. The only difference in the rules would be that the contribution percentages used to determine the lowest contribution percentage would be based on the sum of the QNECs and those matching contributions taken into account in the ACP test, rather than the sum of the QNECs and the QMACs taken into account under the ADP test. Because QNECs that do not exceed 5% are not subject to the limits on targeted QNECs under either the ADP test or the ACP test, an employer is permitted to take into account up to 10% in QNECs

for an eligible NHCE, 5% in ADP testing and 5% in ACP testing, without regard to how many NHCEs receive QNECs.

In addition, to prevent an employer from using targeted matching contributions to circumvent the limitation on targeted QNECs, the proposed regulations would provide that matching contributions are not taken into account in the ACP test to the extent the matching rate for the contribution exceeds the greater of 100% and 2 times the representative matching rate. Paralleling the rule to limit targeted QNECs, the representative plan matching rate is the lowest matching rate for any eligible employee in a group of NHCEs that consists of half of all eligible NHCEs in the plan for the plan year (or the lowest matching rate for all eligible NHCEs in the plan who are employed by the employer on the last day of the plan year, if greater). For this purpose, the matching rate is the ratio of the matching contributions to the contributions that are being matched, and only NHCEs who make elective deferrals or employee contributions for the plan year are taken into account.

The proposed regulations would set limits on the use of elective contributions in the ACP test that are in addition to the rules in the existing regulations under which elective contributions may be taken into account for the ACP test only to the extent the plan satisfies the ADP test, determined by including such elective contributions in the ADP test. Under the new rule, the proposed regulations would provide that elective contributions under a plan that is not subject to the ADP test, such as a plan that uses the safe harbor method of section 401(k)(12) or a contract or arrangement subject to the requirements of section 403(b)(12)(A)(ii), may not be taken into account for the ACP test. In the absence of this prohibition, contributions that are not properly considered ''excess'' could be taken into account under the ACP test.

The provisions of these proposed regulations regarding correction of excess aggregate contributions, including allocation of excess aggregate contributions and determination of allocable income, would generally be consistent with the provisions of the proposed regulations under section 401(k). These proposed regulations continue the provisions of the current regulations regarding correction through distribution of vested matching contributions and forfeiture of unvested matching contributions. Similarly, the proposed regulations reflect the provisions of section 411(a)(3)(G) which permit the forfeiture of a matching contribution made with respect to an excess deferral, excess contribution, or excess aggregate contribution. This provision is necessary to allow forfeiture of matching contributions that would otherwise violate section 401(a)(4).

9. Safe Harbor Section 401(m) Plans

Section 401(m)(11) provides a design-based safe harbor method of satisfying the ACP test contained in section 401(m)(2). Under section 401(m)(11), a defined contribution plan is treated as satisfying the ACP test with respect to matching contributions if the plan satisfies the ADP safe harbor of section 401(k)(12) and matching contributions are not made with respect to employee contributions or elective contributions in excess of 6% of an employee's compensation. For a plan that satisfies the ADP safe harbor using a 3% nonelective contribution, two additional requirements that apply to a plan that satisfies the ADP safe harbor using matching contributions also apply: (1) The rate of an employer's matching contribution does not increase as the rate of employee contributions or elective deferrals increase; and 2) the matching contribution with respect to any HCE at any rate of employee contribution or elective deferral is not greater than with respect to any NHCE. In addition, the ratio of matching contributions on behalf of an HCE to that HCE's elective deferrals and employee contributions for a plan year cannot be greater than the ratio of matching contributions to elective deferrals or employee contributions that would apply with respect to any NHCE who contributes (as an elective deferral or employee contribution) the same percentage of safe harbor compensation for that plan year.

Section 1.401(m)–3 of these proposed regulations, which sets forth the requirements for these plans, would generally follow the rules set forth in Notice 98–52 and Notice 2000–3. These proposed regulations would clarify that, for purposes of determining whether an HCE has a higher rate of matching contributions than any NHCE, any NHCE who is an eligible employee under the safe harbor CODA must be taken into account, even if the NHCE is not eligible for a matching contribution. This means that a plan with a provision which limits matching contributions to employees who are employed on the last day of the plan year will not be able to satisfy the ACP safe harbor, since a NHCE who is not eligible to receive a matching contribution on account of the last day requirement will nonetheless be taken into consideration in determining whether the plan satisfies section 401(m)(11)(B)(iii). The proposed regulations also include the requirement that matching contributions made at the employer's discretion with respect to any employee cannot exceed a dollar amount equal to 4% of the employee's compensation and that a safe harbor plan must permit all eligible NHCEs to make sufficient elective contributions (or employee contributions, if applicable) to receive the maximum matching contribution provided under the plan.

The proposed regulations would provide a special rule for satisfying section 401(m)(11)(B)(iii) in the case of an HCE who participates in two or more plans that provide for matching contributions. Under this rule, a plan will not fail to satisfy the requirements of section 401(m)(11)(B)(iii) merely because an HCE participates during the plan year in more than one plan that provides for matching contributions, provided that the HCE is not simultaneously an eligible employee under two plans that provide for matching contributions maintained by an employer for a plan year; and the period used to determine compensation for purposes of determining matching contributions under each such plan is limited to periods when the HCE participated in the plan. In such a case, an HCE can transfer from a plan with a more generous matching schedule to an otherwise safe harbor section 401(m) plan (for example, as a result of switching jobs within the controlled group) without causing the safe harbor plan to violate section 401(m)(11). However, the plan which is not the safe harbor plan will still have to aggregate matching contributions for the HCE under the rule set forth in section 401(m)(2)(B).

The safe harbor in section 401(m)(11) does not apply to employee contributions. Consequently, a plan that provides for employee contributions and matching contributions must satisfy the ACP test even though the matching contributions satisfy the safe harbor requirements for section 401(m)(11). However, the proposed regulations would also adopt the position in Notice 98–52 that the ACP test is permitted to be applied by disregarding all matching contributions with respect to all eligible employees. If the ADP safe harbor using matching contributions is satisfied but the ACP safe harbor is not satisfied, the proposed regulations would adopt the position in Notice 98–52 that the ACP test is permitted to be applied disregarding matching contributions for

any employee that do not exceed 4% of compensation.

Proposed Effective Date

The regulations are proposed to apply for plan years beginning no sooner than 12 months after publication of final regulations in the **Federal Register**. However, it is anticipated that the preamble for the final regulations will permit plan sponsors to implement the final regulations for the first plan year beginning after publication of final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the conclusion that few plans containing qualified CODAs will correct excess contributions through the recharacterization of these amounts as employee contributions under § 1.401(k)–2(b)(3) of these proposed regulations. The collections of information contained in §§ 1.401(k)–3(d), (f) and 1.401(m)–3(e) are required by statutory provisions. However, the IRS has considered alternatives that would lessen the impact of these statutory requirements on small entities and has requested comments on the use of electronic media to satisfy these notice requirements. Thus, the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. In addition to the other requests for comments set forth in this document, the IRS and Treasury also request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for November 12, 2003, at 10 a.m. in the IRS Auditorium (7th Floor), Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue, NW., entrance, located between 10th and 12th Streets, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by October 22, 2003.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are R. Lisa Mojiri-Azad and John T. Ricotta of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805
26 U.S.C. 401(m)(9) * * *

Par. 2. Sections 1.401(k)–0 and 1.401(k)–1 are revised, and §§ 1.401(k)–2 through 1.401(k)–6 are added to read as follows:

§ 1.401(k)–0 Table of contents.

This section contains first a list of section headings and then a list of the paragraphs in each section in §§ 1.401(k)–1 through 1.401(k)–6.

List of Sections

List of Paragraphs

§ 1.401(k)–2 ADP test.

§ 1.401(k)–1 Certain cash or deferred arrangements.

(a) *General rules*—(1) *Certain plans permitted to include cash or deferred arrangements.* A plan, other than a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan, does not satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a cash or deferred arrangement. A cash or deferred arrangement is part of a plan for purposes of this section if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement.

(2) *Rules applicable to cash or deferred arrangements generally*—(i) *Definition of cash or deferred arrangement.* Except as provided in paragraphs (a)(2)(ii) and (iii) of this section, a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a) (including a contract that is intended to satisfy the requirements of section 403(a)).

(ii) *Treatment of after-tax employee contributions.* A cash or deferred arrangement does not include an arrangement under which amounts contributed under a plan at an employee's election are designated or treated at the time of contribution as after-tax employee contributions (*e.g.*, by treating the contributions as taxable income subject to applicable withholding requirements). *See also* section 414(h)(1). This is the case even if the employee's election to make after-tax employee contributions is made before the amounts subject to the election are currently available to the employee.

(iii) *Treatment of ESOP dividend election.* A cash or deferred arrangement does not include an arrangement under an ESOP under which dividends are either distributed or invested pursuant to an election made by participants or their beneficiaries in accordance with section 404(k)(2)(A)(iii).

(iv) *Treatment of elective contributions as plan assets.* The extent to which elective contributions constitute plan assets for purposes of the prohibited transaction provisions of section 4975 and Title I of the Employee Retirement Income Security Act of 1974 is determined in accordance with regulations and rulings issued by the Department of Labor. *See* 29 CFR 2510.3–102.

(3) *Rules applicable to cash or deferred elections generally*—(i) *Definition of cash or deferred election.* A cash or deferred election is any direct or indirect election (or modification of an earlier election) by an employee to have the employer either—

(A) Provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available; or

(B) Contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation.

(ii) *Automatic enrollment.* For purposes of determining whether an election is a cash or deferred election, it is irrelevant whether the default that applies in the absence of an affirmative election is described in paragraph (a)(3)(i)(A) of this section (*i.e.*, the employee receives an amount in cash or some other taxable benefit) or in paragraph (a)(3)(i)(B) of this section (*i.e.*,

the employer contributes an amount to a trust or provides an accrual or other benefit under a plan deferring the receipt of compensation).

(iii) *Rules related to timing*—(A) *Requirement that amounts not be currently available.* A cash or deferred election can only be made with respect to an amount that is not currently available to the employee on the date of the election. Further, a cash or deferred election can only be made with respect to amounts that would (but for the cash or deferred election) become currently available after the later of the date on which the employer adopts the cash or deferred arrangement or the date on which the arrangement first becomes effective.

(B) *Contribution may not precede election.* A contribution is made pursuant to a cash or deferred election only if the contribution is made after the election is made. In addition, a contribution is made pursuant to a cash or deferred election only if the contribution is made after the employee's performance of services with respect to which the contribution is made (or when the cash or other taxable benefit would be currently available, if earlier).

(iv) *Current availability defined.* Cash or another taxable benefit is currently available to the employee if it has been paid to the employee or if the employee is able currently to receive the cash or other taxable benefit at the employee's discretion. An amount is not currently available to an employee if there is a significant limitation or restriction on the employee's right to receive the amount currently. Similarly, an amount is not currently available as of a date if the employee may under no circumstances receive the amount before a particular time in the future. The determination of whether an amount is currently available to an employee does not depend on whether it has been constructively received by the employee for purposes of section 451.

(v) *Certain one-time elections not treated as cash or deferred elections.* A cash or deferred election does not include a one-time irrevocable election upon an employee's commencement of employment with the employer, or upon the employee's first becoming eligible under the plan or any other plan of the employer (whether or not such other plan has terminated), to have contributions equal to a specified amount or percentage of the employee's compensation (including no amount of compensation) made by the employer on the employee's behalf to the plan and a specified amount or percentage of the employee's compensation (including no amount of compensation) divided among all other plans of the employer (including plans not yet established) for the duration of the employee's employment with the employer, or in the case of a defined benefit plan to receive accruals or other benefits (including no benefits) under such plans. Thus, for example, employer contributions made pursuant to a one-time irrevocable election described in this paragraph are not treated as having been made pursuant to a cash or deferred election and are not includible in an employee's gross income by reason of § 1.402(a)–1(d). In the case of an irrevocable election made on or before December 23, 1994—

(A) The election does not fail to be treated as a one-time irrevocable election under this paragraph (a)(3)(v) merely because an employee was previously eligible under another plan of the employer (whether or not such other plan has terminated); and

(B) In the case of a plan in which partners may participate, the election does not fail to be treated as a one-time irrevocable election under this paragraph (a)(3)(v) merely because the election was made after commencement of employment or after the employee's first becoming eligible under any plan of the employer, provided that the election was made before the first day of the first plan year beginning after December 31, 1988, or, if later, March 31, 1989.

(vi) *Tax treatment of employees.* An amount generally is includible in an employee's gross income for the taxable year in which the employee actually or constructively receives the amount. But for sections 402(e)(3) and 401(k), an employee is treated as having received an amount that is contributed to a plan pursuant to the employee's cash or deferred election. This is the case even if the election to defer is made before the year in which the amount is earned, or before the amount is currently available. *See* § 1.402(a)–1(d).

(vii) *Examples.* The following examples illustrate the application of paragraph (a)(3) of this section:

Example 1. (i) An employer maintains a profit-sharing plan under which each eligible employee has an election to defer an annual bonus payable on January 30 each year. The bonus equals 10% of compensation during the previous calendar year. Deferred amounts are not treated as after-tax employee contributions. The bonus is currently available on January 30.

(ii) An election made prior to January 30 to defer all or part of the bonus is a cash or deferred election, and the bonus deferral arrangement is a cash or deferred arrangement.

Example 2. (i) An employer maintains a profit-sharing plan which provides for discretionary profit sharing contributions and under which each eligible employee may elect to reduce his compensation by up to 10% and to have the employer contribute such amount to the plan. The employer pays each employee every two weeks for services during the immediately preceding two weeks. The employee's election to defer compensation for a payroll period must be made prior to the date the amount would otherwise be paid. The employer contributes to the plan the amount of compensation that each employee elected to defer, at the time it would otherwise be paid to the employee, and does not treat the contribution as an after-tax employee contribution.

(ii) The election is a cash or deferred election and the contributions are elective contributions.

Example 3. (i) The facts are the same as in *Example 2,* except that the employer makes a $10,000 contribution on January 31 of the plan year that is in addition to the contributions that satisfy the employer's obligation to make contributions with respect to cash or deferred elections for prior payroll periods. Employee A makes an election on February 15 to defer $2,000 from compensation that is not currently available and the employer reduces the employee's compensation to reflect the election.

(ii) None of the additional $10,000 contributed January 31 is a contribution made pursuant to Employee A's cash or deferred election, because the contribution was made before the election was made. Accordingly, the employer must make an additional contribution of $2,000 in order to satisfy its obligation to contribute an amount to the plan pursuant to Employee A's election. The $10,000 contribution can be allocated under the plan terms providing for discretionary profit sharing contributions.

Example 4. (i) The facts are the same as in *Example 3,* except that Employee A had an outstanding election to defer $500 from each payroll period's compensation.

(ii) None of the additional $10,000 contributed January 31 is a contribution made pursuant to Employee A's cash or deferred election for future payroll periods, because the contribution was made before the earlier of Employee A's performance of services to which the contribution is attributable or when the compensation would be currently available. Accordingly, the employer must make an additional contribution of $500 per payroll period in order to satisfy its obligation to contribute an amount to the plan pursuant to Employee A's election. The $10,000 contribution can be allocated under the plan terms providing for discretionary profit sharing contributions.

Example 5. (i) Employer B establishes a money purchase pension plan in 1986. This is the first qualified plan established by Employer B. All salaried employees are eligible to participate under the plan. Hourly-paid employees are not eligible to participate under the plan. In 2000, Employer B establishes a profit-sharing plan under which all employees (both salaried and hourly) are eligible. Employer B permits all employees on the effective date of the profit-sharing

plan to make a one-time irrevocable election to have Employer B contribute 5% of compensation on their behalf to the plan and make no other contribution to any other plan of Employer B (including plans not yet established) for the duration of the employee's employment with Employer B, and have their salaries reduced by 5%.

(ii) The election provided under the profit-sharing plan is not a one-time irrevocable election within the meaning of paragraph (a)(3)(v) of this section with respect to the salaried employees of Employer B who, before becoming eligible to participate under the profit-sharing plan, became eligible to participate under the money purchase pension plan. The election under the profit-sharing plan is a one-time irrevocable election within the meaning of paragraph (a)(3)(v) of this section with respect to the hourly employees, because they were not previously eligible to participate under another plan of the employer.

(4) *Rules applicable to qualified cash or deferred arrangements*—(i) *Definition of qualified cash or deferred arrangement.* A qualified cash or deferred arrangement is a cash or deferred arrangement that satisfies the requirements of paragraphs (b), (c), (d), and (e) of this section.

(ii) *Treatment of elective contributions as employer contributions.* Except as otherwise provided in § 1.401(k)–2(b)(3), elective contributions under a qualified cash or deferred arrangement are treated as employer contributions. Thus, for example, elective contributions are treated as employer contributions for purposes of sections 401(a) and 401(k), 402, 404, 409, 411, 412, 415, 416, and 417.

(iii) *Tax treatment of employees.* Except as provided in section 402(g), 402A (effective for years beginning after December 31, 2005), or 1.401(k)–2(b)(3), elective contributions under a qualified cash or deferred arrangement are neither includible in an employee's gross income at the time the cash would have been includible in the employee's gross income (but for the cash or deferred election), nor at the time the elective contributions are contributed to the plan. *See* § 1.402(a)–1(d)(2)(i).

(iv) *Application of nondiscrimination requirements to plan that includes a qualified cash or deferred arrangement*—(A) *Exclusive means of amounts testing.* Elective contributions under a qualified cash or deferred arrangement satisfy the requirements of section 401(a)(4) with respect to amounts if and only if the amount of elective contributions satisfies the nondiscrimination test of section 401(k) under paragraph (b)(1) of this section. *See* § 1.401(a)(4)–1(b)(2)(ii)(B).

(B) *Testing benefits, rights and features.* A plan that includes a qualified cash or deferred arrangement must satisfy the requirements of section 401(a)(4) with respect to benefits, rights and features in addition to the requirements regarding amounts described in paragraph (a)(4)(iv)(A) of this section. For example, the right to make each level of elective contributions under a cash or deferred arrangement is a benefit, right or feature subject to the requirements of section 401(a)(4). *See* § 1.401(a)(4)–4(e)(3)(i) and (iii)(D). Thus, for example, if all employees are eligible to make a stated level of elective contributions under a cash or deferred arrangement, but that level of contributions can only be made from compensation in excess of a stated amount, such as the Social Security taxable wage base, the arrangement will generally favor HCEs with respect to the availability of elective contributions and thus will generally not satisfy the requirements of section 401(a)(4).

(C) *Minimum coverage requirement.* A qualified cash or deferred arrangement is treated as a separate plan that must satisfy the requirements of section 410(b). *See* § 1.410(b)–7(c)(1) for special rules. The determination of whether a cash or deferred arrangement satisfies the requirements of section 410(b) must be made without regard to the modifications to the disaggregation rules set forth in paragraph (b)(4)(v) of this section. *See also* § 1.401(a)(4)–11(g)(3)(vii)(A), relating to corrective amendments that may be made to satisfy the minimum coverage requirements of section 410(b).

(5) *Rules applicable to nonqualified cash or deferred arrangements*—(i) *Definition of nonqualified cash or deferred arrangement.* A nonqualified cash or deferred arrangement is a cash or deferred arrangement that fails to satisfy one or more of the requirements in paragraph (b), (c), (d) or (e) of this section.

(ii) *Treatment of elective contributions as nonelective contributions.* Except as specifically provided otherwise, elective contributions under a nonqualified cash or deferred arrangement are treated as nonelective employer contributions. Thus, for example, the elective contributions are treated as nonelective employer contributions for purposes of sections 401(a) (including section 401(a)(4)) and 401(k), 404, 409, 411, 412, 415, 416, and 417 and are not subject to the requirements of section 401(m).

(iii) *Tax treatment of employees.* Elective contributions under a nonqualified cash or deferred arrangement are includible in an employee's gross income at the time the cash or other taxable amount that the employee would have received (but for the cash or deferred election) would have been includible in the employee's gross income. *See* § 1.402(a)–1(d)(1).

(iv) *Qualification of plan that includes a nonqualified cash or deferred arrangement*—(A) *In general.* A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a nonqualified cash or deferred arrangement. In determining whether the plan satisfies the requirements of section 401(a)(4), the nondiscrimination tests of sections 401(k), paragraph (b)(1) of this section, section 401(m)(2) and § 1.401(m)–1(b) may not be used. *See* §§ 1.401(a)(4)–1(b)(2)(ii)(B) and 1.410(b)–9 (definition of section 401(k) plan).

(B) *Application of section 401(a)(4) to certain plans.* The amount of employer contributions under a nonqualified cash or deferred arrangement is treated as satisfying section 401(a)(4) if the arrangement is part of a collectively bargained plan that automatically satisfies the requirements of section 410(b). *See* §§ 1.401(a)(4)–1(c)(5) and 1.410(b)–2(b)(7). Additionally, the requirements of sections 401(a)(4) and 410(b) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof). *See* sections 401(a)(5) and 410(c)(1)(A).

(v) *Example.* The following example illustrates the application of this paragraph (a)(5):

Example. (i) For the 2006 plan year, Employer A maintains a collectively bargained plan that includes a cash or deferred arrangement. Employer contributions under the cash or deferred arrangement do not satisfy the nondiscrimination test of section 401(k) and paragraph (b) of this section.

(ii) The arrangement is a nonqualified cash or deferred arrangement. The employer contributions under the cash or deferred arrangement are considered to be nondiscriminatory under section 401(a)(4), and the elective contributions are generally treated as employer contributions under paragraph (a)(5)(ii) of this section. Under paragraph (a)(5)(iii) of this section and under § 1.402(a)–1(d)(1), however, the elective contributions are includible in each employee's gross income.

(6) *Rules applicable to cash or deferred arrangements of self-employed individuals*—(i) *Application of general rules.* Generally, a partnership or sole proprietorship is permitted to maintain a cash or deferred arrangement, and individual partners or owners are

permitted to make cash or deferred elections with respect to compensation attributable to services rendered to the entity, under the same rules that apply to other cash or deferred arrangements. For example, any contributions made on behalf of an individual partner or owner pursuant to a cash or deferred arrangement of a partnership or sole proprietorship are elective contributions unless they are designated or treated as after-tax employee contributions. In the case of a partnership, a cash or deferred arrangement includes any arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf. Consistent with § 1.402(a)–1(d), the elective contributions under such an arrangement are includible in income and are not deductible under section 404(a) unless the arrangement is a qualified cash or deferred arrangement (*i.e.*, the requirements of section 401(k) and this section are satisfied). Also, even if the arrangement is a qualified cash or deferred arrangement, the elective contributions are includible in gross income and are not deductible under section 404(a) to the extent they exceed the applicable limit under section 402(g). *See also* § 1.401(a)–30.

(ii) *Treatment of matching contributions made on behalf of self-employed individuals.* Under section 402(g)(8), matching contributions made on behalf of a self-employed individual are not treated as elective contributions made pursuant to a cash or deferred election, without regard to whether such matching contributions indirectly permit individual partners to vary the amount of contributions made on their behalf.

(iii) *Timing of self-employed individual's cash or deferred election.* For purposes of paragraph (a)(3)(iv) of this section, a partner's compensation is deemed currently available on the last day of the partnership taxable year and a sole proprietor's compensation is deemed currently available on the last day of the individual's taxable year. Accordingly, a self-employed individual may not make a cash or deferred election with respect to compensation for a partnership or sole proprietorship taxable year after the last day of that year. *See* § 1.401(k)–2(a)(4)(ii) for the rules regarding when these contributions are treated as allocated.

(b) *Coverage and nondiscrimination requirements*—(1) *In general.* A cash or deferred arrangement satisfies this paragraph (b) for a plan year only if—

(i) The group of eligible employees under the cash or deferred arrangement (including any employee taken into account for purposes of section 410(b) pursuant to § 1.401(a)(4)–11(g)(3)(vii)(A)) satisfies the requirements of section 410(b) (including the average benefit percentage test, if applicable); and

(ii) The cash or deferred arrangement satisfies—

(A) The ADP test of section 401(k)(3) described in § 1.401(k)–2;

(B) The ADP safe harbor provisions of section 401(k)(12) described in § 1.401(k)–3; or

(C) The SIMPLE 401(k) provisions of section 401(k)(11) described in § 1.401(k)–4.

(2) *Automatic satisfaction by certain plans.* Notwithstanding paragraph (b)(1) of this section, a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) shall be treated as meeting the requirements of this paragraph (b).

(3) *Anti-abuse provisions.* The regulations in this paragraph (b) are designed to provide simple, practical rules that accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ADP for NHCEs (which is used as a benchmark for testing the ADP for HCEs) or to otherwise manipulate the nondiscrimination testing requirements of this paragraph (b). Further, this paragraph (b) is part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of this paragraph (b) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ADP so as to increase significantly the permitted ADP for HCEs, or otherwise manipulate the nondiscrimination rules of this paragraph, if a principal purpose of the changes was to achieve such a result.

(4) *Aggregation and restructuring*—(i) *In general.* This paragraph (b)(4) contains the exclusive rules for aggregating and disaggregating plans and cash or deferred arrangements for purposes of this section, and §§ 1.401(k)–2 through 1.401(k) –6.

(ii) *Aggregation of cash or deferred arrangements within a plan.* Except as otherwise specifically provided in this paragraph (b)(4), all cash or deferred arrangements included in a plan are treated as a single cash or deferred arrangement and a plan must apply a single test under paragraph (b)(1)(ii) of this section with respect to all such arrangements within the plan. Thus, for example, if two groups of employees are eligible for separate cash or deferred arrangements under the same plan, all contributions under both cash or deferred arrangements must be treated as made under a single cash or deferred arrangement subject to a single test, even if they have significantly different features, such as different limits on elective contributions.

(iii) *Aggregation of plans*—(A) *In general.* For purposes of this section and §§ 1.401(k)–2 through 1.401(k)–6, the term plan means a plan within the meaning of § 1.410(b)–7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)–7(c), and the permissive aggregation rules of § 1.410(b)–7(d), as modified by paragraph (b)(4)(v) of this section. Thus, for example, two plans (within the meaning of § 1.410(b)–7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)–7(d) are treated as a single plan for purposes of section 401(k) and section 401(m).

(B) *Plans with inconsistent ADP testing methods.* Pursuant to paragraph (b)(4)(ii) of this section, a single testing method must apply with respect to all cash or deferred arrangements under a plan. Thus, in applying the permissive aggregation rules of § 1.410(b)–7(d), an employer may not aggregate plans (within the meaning of § 1.410(b)–7(b)) that apply inconsistent testing methods. For example, a plan (within the meaning of § 1.410(b)–7(b)) that applies the current year testing method may not be aggregated with another plan that applies the prior year testing method. Similarly, an employer may not aggregate a plan (within the meaning of § 1.410(b)–7(b)) using the ADP safe harbor provisions of section 401(k)(12) and another plan that is using the ADP test of section 401(k)(3).

(iv) *Disaggregation of plans and separate testing*—(A) *In general.* If a cash or deferred arrangement is included in a plan (within the meaning of § 1.410(b)–7(b)) that is mandatorily disaggregated under the rules of section 410(b) (as modified by this paragraph (b)(4)), the cash or deferred arrangement must be disaggregated in a consistent manner. For example, in the case of an employer that is treated as operating qualified separate lines of business under section 414(r), if the eligible employees under a cash or deferred arrangement are in more than one qualified separate line of business, only those employees within each qualified separate line of business may be taken into account in determining whether each disaggregated portion of the plan

complies with the requirements of section 401(k), unless the employer is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan. Similarly, if a cash or deferred arrangement under which employees are permitted to participate before they have completed the minimum age and service requirements of section 410(a)(1) applies section 410(b)(4)(B) for determining whether the plan complies with section 410(b)(1), then the arrangement must be treated as two separate arrangements, one comprising all eligible employees who have met the age and service requirements of section 410(a)(1) and one comprising all eligible employees who have not met the age and service requirements under section 410(a)(1), unless the plan is using the rule in § 1.401(k)–2(a)(1)(iii)(A).

(B) *Restructuring prohibited.* Restructuring under § 1.401(a)(4)–9(c) may not be used to demonstrate compliance with the requirements of section 401(k). *See* § 1.401(a)(4)–9(c)(3)(ii).

(v) *Modifications to section 410(b) rules*—(A) *Certain disaggregation rules not applicable.* The mandatory disaggregation rules relating to section 401(k) plans and section 401(m) plans set forth in § 1.410(b)–7(c)(1) and ESOP and non-ESOP portions of a plan set forth in § 1.410(b)–7(c)(2) shall not apply for purposes of this section and §§ 1.401(k)–2 through 1.401(k)–6. Accordingly, notwithstanding § 1.410(b)–7(d)(2), an ESOP and a non-ESOP which are different plans (within the meaning of § 1.410(b)–7(b)) are permitted to be aggregated for these purposes.

(B) *Permissive aggregation of collective bargaining units.* Notwithstanding the general rule under section 410(b) and § 1.410(b)–7(c) that a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement and employees who are not included in the collective bargaining unit is treated as comprising separate plans, an employer can treat two or more separate collective bargaining units as a single collective bargaining unit for purposes of this section and § 1.401(k)–2 through § 1.401(k)–6, provided that the combinations of units are determined on a basis that is reasonable and reasonably consistent from year to year. Thus, for example, if a plan benefits employees in three categories (*e.g.*, employees included in collective bargaining unit A, employees included in collective bargaining unit B, and employees who are not included in any collective bargaining unit), the plan can be treated as comprising three separate plans, each of which benefits only one category of employees. However, if collective bargaining units A and B are treated as a single collective bargaining unit, the plan will be treated as comprising only two separate plans, one benefitting all employees who are included in a collective bargaining unit and another benefitting all other employees. Similarly, if a plan benefits only employees who are included in collective bargaining unit A and employees who are included in collective bargaining unit B, the plan can be treated as comprising two separate plans. However, if collective bargaining units A and B are treated as a single collective bargaining unit, the plan will be treated as a single plan. An employee is treated as included in a unit of employees covered by a collective bargaining agreement if and only if the employee is a collectively bargained employee within the meaning of § 1.410(b)–6(d)(2).

(C) *Multiemployer plans.* Notwithstanding § 1.410(b)–7(c)(4)(ii)(C), the portion of the plan that is maintained pursuant to a collective bargaining agreement (within the meaning of § 1.413–1(a)(2)) is treated as a single plan maintained by a single employer that employs all the employees benefitting under the same benefit computation formula and covered pursuant to that collective bargaining agreement. The rules of paragraph (b)(4)(v)(B) of this section (including the permissive aggregation of collective bargaining units) apply to the resulting deemed single plan in the same manner as they would to a single employer plan, except that the plan administrator is substituted for the employer where appropriate and appropriate fiduciary obligations are taken into account. The noncollectively bargained portion of the plan is treated as maintained by one or more employers, depending on whether the noncollectively bargaining unit employees who benefit under the plan are employed by one or more employers.

(vi) *Examples.* The following examples illustrate the application of this paragraph (b)(4):

Example 1. (i) Employer A maintains Plan V, a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer A are eligible to participate. For purposes of applying section 410(b), Employer A is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b). However, Employer A applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of its profit-sharing plan that consists of elective contributions under the cash or deferred arrangement (and to no other plans or portions of plans).

(ii) Under these facts, the requirements of this section and §§ 1.401(k)–2 through 1.401(k)–6 must be applied on an employer-wide rather than a qualified separate line of business basis.

Example 2. (i) Employer B maintains Plan W, a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer B are eligible to participate. For purposes of applying section 410(b), the plan treats the cash or deferred arrangement as two separate plans, one for the employees who have completed the minimum age and service eligibility conditions under section 410(a)(1) and the other for employees who have not completed the conditions. The plan provides that it will satisfy the section 401(k) safe harbor requirement of § 1.401(k)–3 with respect to the employees who have met the minimum age and service conditions and that it will meet the ADP test requirements of § 1.401(k)–2 with respect to the employees who have not met the minimum age and service conditions.

(ii) Under these facts, the cash or deferred arrangement must be disaggregated on a consistent basis with the disaggregation of Plan W. Thus, the requirements of § 1.401(k)–2 must be applied by comparing the ADP for eligible HCEs who have not completed the minimum age and service conditions with the ADP for eligible NHCEs for the applicable year who have not completed the minimum age and service conditions.

Example 3. (i) Employer C maintains Plan X, a stock-bonus plan including an ESOP. The plan also includes a cash or deferred arrangement for participants in the ESOP and non-ESOP portions of the plan.

(ii) Pursuant to paragraph (b)(4)(v)(A) of this section the ESOP and non-ESOP portions of the stock-bonus plan are a single cash or deferred arrangement for purposes of this section and §§ 1.401(k)-2 through 1.401(k)-6. However, as provided in paragraph (a)(4)(iv)(C) of this section, the ESOP and non-ESOP portions of the plan are still treated as separate plans for purposes of satisfying the requirements of section 410(b).

(c) *Nonforfeitability requirements*—(1) *General rule.* A cash or deferred arrangement satisfies this paragraph (c) only if the amount attributable to an employee's elective contributions are immediately nonforfeitable, within the meaning of paragraph (c)(2) of this section, are disregarded for purposes of applying section 411(a) to other contributions or benefits, and the contributions remain nonforfeitable even if the employee makes no additional elective contributions under a cash or deferred arrangement.

(2) *Definition of immediately nonforfeitable.* An amount is immediately nonforfeitable if it is immediately nonforfeitable within the meaning of section 411, and would be nonforfeitable under the plan regardless

of the age and service of the employee or whether the employee is employed on a specific date. An amount that is subject to forfeitures or suspensions permitted by section 411(a)(3) does not satisfy the requirements of this paragraph (c).

(3) *Example.* The following example illustrates the application of this paragraph (c):

Example. (i) Employees B and C are covered by Employer Y's stock bonus plan, which includes a cash or deferred arrangement. All employees participating in the plan have a nonforfeitable right to a percentage of their account balance derived from all contributions (including elective contributions) as shown in the following table:

Years of service	Nonforfeitable percentage
Less than 1	0
1	20
2	40
3	60
4	80
5 or more	100

(ii) The cash or deferred arrangement does not satisfy paragraph (c) of this section because elective contributions are not immediately nonforfeitable. Thus, the cash or deferred arrangement is a nonqualified cash or deferred arrangement.

(d) *Distribution limitation*—(1) *General rule.* A cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions may not be distributed before one of the following events, and any distributions so permitted also satisfy the additional requirements of paragraphs (d)(2) through (5) of this section (to the extent applicable)—

(i) The employee's death, disability, or severance from employment;

(ii) In the case of a profit-sharing, stock bonus or rural cooperative plan, the employee's attainment of age 59½, or the employee's hardship; or

(iii) The termination of the plan.

(2) *Rules applicable to distributions upon severance from employment.* An employee has a severance from employment when the employee ceases to be an employee of the employer maintaining the plan. An employee does not have a severance from employment if, in connection with a change of employment, the employee's new employer maintains such plan with respect to the employee. For example, a new employer maintains a plan with respect to an employee by continuing or assuming sponsorship of the plan or by accepting a transfer of plan assets and liabilities (within the meaning of section 414(l)) with respect to the employee).

(3) *Rules applicable to hardship distributions*—(i) *Distribution must be on account of hardship.* A distribution is treated as made after an employee's hardship for purposes of paragraph (d)(1)(ii) of this section if and only if it is made on account of the hardship. For purposes of this rule, a distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. The determination of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan.

(ii) *Limit on maximum distributable amount*—(A) *General rule.* A distribution on account of hardship must be limited to the maximum distributable amount. The maximum distributable amount is equal to the employee's total elective contributions as of the date of distribution, reduced by the amount of previous distributions of elective contributions. Thus, the maximum distributable amount does not include earnings, QNECs or QMACs, unless grandfathered under paragraph (d)(3)(ii)(B) of this section.

(B) *Grandfathered amounts.* If the plan provides, the maximum distributable amount may be increased for amounts credited to the employee's account as of a date specified in the plan that is no later than December 31, 1988, or if later, the end of the last plan year ending before July 1, 1989 (or in the case of a collectively bargained plan, the earlier of—

(*1*) The later of January 1, 1989, or the date on which the last of the collective bargaining agreements in effect on March 1, 1986 terminates (determined without regard to any extension thereof after February 28, 1986); or

(*2*) January 1, 1991) and consisting of—

(*i*) Income allocable to elective contributions;

(*ii*) Qualified nonelective contributions and allocable income; and

(*iii*) Qualified matching contributions and allocable income.

(iii) *Immediate and heavy financial need*—(A) *In general.* Whether an employee has an immediate and heavy financial need is to be determined based on all the relevant facts and circumstances. Generally, for example, the need to pay the funeral expenses of a family member would constitute an immediate and heavy financial need. A distribution made to an employee for the purchase of a boat or television would generally not constitute a distribution made on account of an immediate and heavy financial need. A financial need may be immediate and heavy even if it was reasonably foreseeable or voluntarily incurred by the employee.

(B) *Deemed immediate and heavy financial need.* A distribution is deemed to be on account of an immediate and heavy financial need of the employee if the distribution is for—

(*1*) Expenses for medical care described in section 213(d) previously incurred by the employee, the employee's spouse, or any dependents of the employee (as defined in section 152) or necessary for these persons to obtain medical care described in section 213(d);

(*2*) Costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments);

(*3*) Payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the employee, or the employee's spouse, children, or dependents (as defined in section 152); or

(*4*) Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence.

(iv) *Distribution necessary to satisfy financial need*—(A) *Distribution may not exceed amount of need.* A distribution is treated as necessary to satisfy an immediate and heavy financial need of an employee only to the extent the amount of the distribution is not in excess of the amount required to satisfy the financial need. For this purpose, the amount required to satisfy the financial need may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

(B) *No alternative means available.* A distribution is not treated as necessary to satisfy an immediate and heavy financial need of an employee to the extent the need may be relieved from other resources that are reasonably available to the employee. This determination generally is to be made on the basis of all the relevant facts and circumstances. For purposes of this paragraph (d)(3)(iv), the employee's resources are deemed to include those assets of the employee's spouse and minor children that are reasonably available to the employee. Thus, for example, a vacation home owned by the employee and the employee's spouse, whether as community property, joint tenants, tenants by the entirety, or

tenants in common, generally will be deemed a resource of the employee. However, property held for the employee's child under an irrevocable trust or under the Uniform Gifts to Minors Act (or comparable State law) is not treated as a resource of the employee.

(C) *Employer reliance on employee representation.* For purposes of paragraph (d)(3)(iv)(B) of this section, an immediate and heavy financial need generally may be treated as not capable of being relieved from other resources that are reasonably available to the employee, if the employer relies upon the employee's written representation, unless the employer has actual knowledge to the contrary, that the need cannot reasonably be relieved—

(*1*) Through reimbursement or compensation by insurance or otherwise;

(*2*) By liquidation of the employee's assets;

(*3*) By cessation of elective contributions or employee contributions under the plan;

(*4*) By other distributions or nontaxable (at the time of the loan) loans from plans maintained by the employer or by any other employer; or

(*5*) By borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

(D) *Employee need not take counterproductive actions.* For purposes of this paragraph (d)(3)(iv), a need cannot reasonably be relieved by one of the actions described in paragraph (d)(3)(iv)(C) of this section if the effect would be to increase the amount of the need. For example, the need for funds to purchase a principal residence cannot reasonably be relieved by a plan loan if the loan would disqualify the employee from obtaining other necessary financing.

(E) *Distribution deemed necessary to satisfy immediate and heavy financial need.* A distribution is deemed necessary to satisfy an immediate and heavy financial need of an employee if each of the following requirements are satisfied—

(*1*) The employee has obtained all distributions, other than hardship distributions, and all nontaxable (at the time of the loan) loans currently available under the plan and all other plans maintained by the employer; and

(*2*) The employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least 6 months after receipt of the hardship distribution.

(F) *Definition of other plans.* For purposes of paragraph (d)(3)(iv)(C)(*4*) and (E)(*1*) of this section, the phrase ''plans maintained by the employer'' means all qualified and nonqualified plans of deferred compensation maintained by the employer, including a cash or deferred arrangement that is part of a cafeteria plan within the meaning of section 125. However, it does not include the mandatory employee contribution portion of a defined benefit plan or a health or welfare benefit plan (including one that is part of a cafeteria plan). In addition, for purposes of paragraph (d)(3)(iv)(E)(*2*) of this section, the phrase ''plans maintained by the employer'' also includes a stock option, stock purchase, or similar plan maintained by the employer. *See* § 1.401(k)–6 for the continued treatment of suspended employees as eligible employees.

(v) *Commissioner may expand standards.* The Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (see 601.601(d)(2) of this chapter), expanding the list of deemed immediate and heavy financial needs and prescribing additional methods for distributions to be deemed necessary to satisfy an immediate and heavy financial need.

(4) *Rules applicable to distributions upon plan termination*—(i) *No alternative defined contribution plan.* A distribution may not be made under paragraph (d)(1)(iii) of this section if the employer establishes or maintains an alternative defined contribution plan. For purposes of the preceding sentence, the definition of the term ''employer'' contained in § 1.401(k)–6 is applied as of the date of plan termination, and a plan is an alternative defined contribution plan only if it is a defined contribution plan that exists at any time during the period beginning on the date of plan termination and ending 12 months after distribution of all assets from the terminated plan. However, if at all times during the 24-month period beginning 12 months before the termination, fewer than 2% of the employees who were eligible under the defined contribution plan that includes the cash or deferred arrangement as of the date of plan termination are eligible under the other defined contribution plan, the other plan is not an alternative defined contribution plan. In addition, a defined contribution plan is not treated as an alternative defined contribution plan if it is an employee stock ownership plan as defined in section 4975(e)(7) or 409(a), a simplified employee pension as defined in section 408(k), a SIMPLE IRA plan as defined in section 408(p), a plan or contract that satisfies the requirements of section 403(b), or a plan that satisfies the requirements of section 457.

(ii) *Lump sum requirement for certain distributions.* A distribution may be made under paragraph (d)(1)(iii) of this section only if it is a lump sum distribution. The term lump sum distribution has the meaning provided in section 402(e)(4)(D) (without regard to section 402(e)(4)(D)(i)(I), (II), (III) and (IV)). In addition, a lump sum distribution includes a distribution of an annuity contract from a trust that is part of a plan described in section 401(a) and which is exempt from tax under section 501(a) or an annuity plan described in 403(a).

(5) *Rules applicable to all distributions*—(i) *Exclusive distribution rules.* Amounts attributable to elective contributions may not be distributed on account of any event not described in this paragraph (d), such as completion of a stated period of plan participation or the lapse of a fixed number of years. For example, if excess deferrals (and income) for an employee's taxable year are not distributed within the time prescribed in § 1.402(g)–1(e)(2) or (3), the amounts may be distributed only on account of an event described in this paragraph (d). Pursuant to section 401(k)(8), the prohibition on distributions set forth in this section does not apply to a distribution of excess contributions under § 1.401(k)–2(b). In addition, the prohibition on distributions set forth in this paragraph (d) does not apply to a distribution of excess annual additions pursuant to § 1.415–6(b)(6)(iv).

(ii) *Deemed distributions.* The cost of life insurance (determined under section 72) is not treated as a distribution for purposes of section 401(k)(2) and this paragraph (d). The making of a loan is not treated as a distribution, even if the loan is secured by the employee's accrued benefit attributable to elective contributions or is includible in the employee's income under section 72(p). However, the reduction, by reason of default on a loan, of an employee's accrued benefit derived from elective contributions is treated as a distribution.

(iii) *ESOP dividend distributions.* A plan does not fail to satisfy the requirements of this paragraph (d) merely by reason of a dividend distribution described in section 404(k)(2).

(iv) *Limitations apply after transfer.* The limitations of this paragraph (d) generally continue to apply to amounts

attributable to elective contributions (including QNECs and qualified matching contributions taken into account for the ADP test under § 1.401(k)–2(a)(6)) that are transferred to another qualified plan of the same or another employer. Thus, the transferee plan will generally fail to satisfy the requirements of section 401(a) and this section if transferred amounts may be distributed before the times specified in this paragraph (d). In addition, a cash or deferred arrangement fails to satisfy the limitations of this paragraph (d) if it transfers amounts to a plan that does not provide that the transferred amounts may not be distributed before the times specified in this paragraph (d). The transferor plan does not fail to comply with the preceding sentence if it reasonably concludes that the transferee plan provides that the transferred amounts may not be distributed before the times specified in this paragraph (d). What constitutes a basis for a reasonable conclusion is comparable to the rules related to acceptance of rollover distributions. *See* § 1.401(a)(31)–1, A–14. The limitations of this paragraph (d) cease to apply after the transfer, however, if the amounts could have been distributed at the time of the transfer (other than on account of hardship), and the transfer is an elective transfer described in § 1.411(d)–4, Q&A–3(b)(1). The limitations of this paragraph (d) also do not apply to amounts that have been paid in a direct rollover to the plan after being distributed by another plan.

(6) *Examples.* The following examples illustrate the application of this paragraph (d):

Example 1. Employer M maintains Plan V, a profit-sharing plan that includes a cash or deferred arrangement. Elective contributions under the arrangement may be withdrawn for any reason after two years following the end of the plan year in which the contributions were made. Because the plan permits distributions of elective contributions before the occurrence of one of the events specified in section 401(k)(2)(B) and this paragraph (d), the cash or deferred arrangement is a nonqualified cash or deferred arrangement and the elective contributions are currently includible in income under section 402.

Example 2. (i) Employer N maintains Plan W, a profit-sharing plan that includes a cash or deferred arrangement. Plan W provides for distributions upon a participant's severance from employment, death or disability. All employees of Employer N and its wholly owned subsidiary, Employer O, are eligible to participate in Plan W. Employer N agrees to sell all issued and outstanding shares of Employer O to an unrelated entity, Employer T, effective on December 31, 2006. Following the transaction, Employer O will be a wholly owned subsidiary of Employer T. Additionally, individuals who are employed by Employer O on the effective date of the sale continue to be employed by Employer O following the sale. Following the transaction, all employees of Employer O will cease to participate in Plan W and will become eligible to participate in the cash or deferred arrangement maintained by Employer T, Plan X. No assets will be transferred from Plan W to Plan X, except in the case of a direct rollover within the meaning of section 401(a)(31).

(ii) Employer O ceases to be a member of Employer N's controlled group as a result of the sale. Therefore, employees of Employer O who participated in Plan W will have a severance from employment and are eligible to receive a distribution from Plan W.

Example 3. (i) Employer Q maintains Plan Y, a profit-sharing plan that includes a cash or deferred arrangement. Plan Y, the only plan maintained by Employer Q, does not provide for loans. However, Plan Y provides that elective contributions under the arrangement may be distributed to an eligible employee on account of hardship using the deemed immediate and heavy financial need provisions of paragraph (d)(3)(iii)(B) of this section and provisions regarding distributions necessary to satisfy financial need of paragraphs (d)(3)(iv)(A) through (D) of this section. Employee A is an eligible employee in Plan Y with an account balance of $50,000 attributable to elective contributions made by Employee A. The total amount of elective contributions made by Employee A, who has not previously received a distribution from Plan Y, is $20,000. Employee A requests a $15,000 hardship distribution of his elective contributions to pay 6 months of college tuition and room and board expenses for his dependent child. At the time of the distribution request, the sole asset of Employee A (that is reasonably available to Employee A within the meaning of paragraph (d)(3)(iv)(B) of this section) is a savings account with an available balance of $10,000.

(ii) A distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee A's dependant child is deemed to be on account of an immediate and heavy financial need of Employee A.

(iii) A distribution is treated as necessary to satisfy Employee A's immediate and heavy financial need to the extent the need may not be relieved from other resources reasonably available to Employee A. Under paragraph (d)(3)(iv)(B) of this section, Employee A's $10,000 savings account is a resource that is reasonably available to the employee and must be taken into account in determining the amount necessary to satisfy Employee A's immediate and heavy financial need. Thus, Employee A may receive a distribution of only $5,000 of his elective contributions on account of this hardship, plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 4. (i) The facts are the same as in *Example 3.* Employee B, another employee of Employer Q has an account balance of $25,000, attributable to Employee B's elective contributions. The total amount of elective contributions made by Employee B, who has not previously received a distribution from Plan Y, is $15,000. Employee B requests a $10,000 distribution of his elective contributions to pay 6 months of college tuition and room and board expenses for his dependent child. Employee B makes a written representation (with respect to which Employer Q has no actual knowledge to the contrary) that the need cannot reasonably be relieved: (1) through reimbursement or compensation by insurance or otherwise; (2) by liquidation of the employee's assets; (3) by cessation of elective contributions or employee contributions under the plan; (4) by other distributions or nontaxable (at the time of the loan) loans from plans maintained by the employer or by any other employer; or (5) by borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

(ii) Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee B's dependant child is deemed to be on account of an Employee B's immediate and heavy financial need. In addition, because Employer Q can rely on Employee B's written representation, the distribution is considered necessary to satisfy Employee B's immediate and heavy financial need. Therefore, Employee B may receive a $10,000 distribution of his elective contributions on account of hardship plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 5. (i) The facts are the same as in *Example 3*, except Plan Y provides for hardship distributions using the safe harbor rule of paragraph (d)(3)(iv)(E) of this section. Accordingly, Plan Y provides for a 6 month suspension of an eligible employee's elective contributions and employee contributions to the plan after the receipt of a hardship distribution by such eligible employee.

(ii) Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee A's dependant child is deemed to be on account of an Employee A's immediate and heavy financial need. In addition, because Employee A is not eligible for any other distribution or loan from Plan Y and Plan Y suspends Employee A's elective contributions and employee contributions following receipt of the hardship distribution, the distribution will be deemed necessary to satisfy Employee A's immediate and heavy financial need (and Employee A is not required to first liquidate his savings account). Therefore, Employee A may receive a $15,000 distribution of his elective contributions on account of hardship plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 6. Employer R maintains a pre-ERISA money purchase pension plan that

includes a cash or deferred arrangement that is not a rural cooperative plan. Elective contributions under the arrangement may be distributed to an employee on account of hardship. Under paragraph (d)(1) of this section, hardship is a permissible distribution event only in a profit-sharing, stock bonus or rural cooperative plan. Since elective contributions under the arrangement may be distributed before a permissible distribution event occurs, the cash or deferred arrangement does not satisfy this paragraph (d), and is not a qualified cash or deferred arrangement. Moreover, the plan is not a qualified plan because a money purchase pension plan may not provide for payment of benefits upon hardship. *See* § 1.401–1(b)(1)(i).

(e) *Additional requirements for qualified cash or deferred arrangements*—(1) *Qualified plan requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if the plan of which it is a part is a profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan that otherwise satisfies the requirements of section 401(a) (taking into account the cash or deferred arrangement). A plan that includes a cash or deferred arrangement may provide for other contributions, including employer contributions (other than elective contributions), employee contributions, or both. However, except as expressly permitted under section 401(m), 410(b)(2)(A)(ii) or 416(c)(2)(A), elective contributions and matching contributions taken into account under § 1.401(k)–2(a) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the contributions are made) satisfy the requirements of section 401(a).

(2) *Election requirements*—(i) *Cash must be available.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides that the amount that each eligible employee may defer as an elective contribution is available to the employee in cash. Thus, for example, if an eligible employee is provided the option to receive a taxable benefit (other than cash) or to have the employer contribute on the employee's behalf to a profit-sharing plan an amount equal to the value of the taxable benefit, the arrangement is not a qualified cash or deferred arrangement. Similarly, if an employee has the option to receive a specified amount in cash or to have the employer contribute an amount in excess of the specified cash amount to a profit-sharing plan on the employee's behalf, any contribution made by the employer on the employee's behalf in excess of the specified cash amount is not treated as made pursuant to a qualified cash or deferred arrangement. This cash availability requirement applies even if the cash or deferred arrangement is part of a cafeteria plan within the meaning of section 125.

(ii) *Frequency of elections.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides an employee with an effective opportunity to make (or change) a cash or deferred election at least once during each plan year. Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

(3) *Separate accounting requirement*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if the portion of an employee's benefit subject to the requirements of paragraphs (c) and (d) of this section is determined by an acceptable separate accounting between that portion and any other benefits. Separate accounting is not acceptable unless gains, losses, withdrawals, and other credits or charges are separately allocated on a reasonable and consistent basis to the accounts subject to the requirements of paragraphs (c) and (d) of this section and to other accounts. Subject to section 401(a)(4), forfeitures are not required to be allocated to the accounts in which benefits are subject to paragraphs (c) and (d) of this section.

(ii) *Satisfaction of separate accounting requirement.* The requirements of paragraph (e)(3)(i) of this section are treated as satisfied if all amounts held under a plan that includes a cash or deferred arrangement (and, if applicable, under another plan to which QNECs and QMACs are made) are subject to the requirements of paragraphs (c) and (d) of this section.

(4) *Limitations on cash or deferred arrangements of state and local governments*—(i) *General rule.* A cash or deferred arrangement does not satisfy the requirements of this paragraph (e) if the arrangement is adopted after May 6, 1986, by a State or local government or political subdivision thereof, or any agency or instrumentality thereof (a governmental unit). For purposes of this paragraph (e)(4), an employer that has made a legally binding commitment to adopt a cash or deferred arrangement is treated as having adopted the arrangement on that date.

(ii) *Rural cooperative plans and Indian tribal governments.* This paragraph (e)(4) does not apply to a rural cooperative plan or to a plan of an employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State or tribal law which is owned in whole or in part by any of the entities in this paragraph (e)(4)(ii).

(iii) *Adoption after May 6, 1986.* A cash or deferred arrangement is treated as adopted after May 6, 1986, with respect to all employees of any employer that adopts the arrangement after such date.

(iv) *Adoption before May 7, 1986.* If a governmental unit adopted a cash or deferred arrangement before May 7, 1986, then any cash or deferred arrangement adopted by the unit at any time is treated as adopted before that date. If an employer adopted an arrangement prior to such date, all employees of the employer may participate in the arrangement.

(5) *One-year eligibility requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if no employee is required to complete a period of service with the employer maintaining the plan extending beyond the period permitted under section 410(a)(1) (determined without regard to section 410(a)(1)(B)(i)) to be eligible to make a cash or deferred election under the arrangement.

(6) *Other benefits not contingent upon elective contributions*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if no other benefit is conditioned (directly or indirectly) upon the employee's electing to make or not to make elective contributions under the arrangement. The preceding sentence does not apply to—

(A) Any matching contribution (as defined in § 1.401(m)–1(a)(2)) made by reason of such an election;

(B) Any benefit, right or feature (such as a plan loan) that requires, or results in, an amount to be withheld from an employee's pay (*e.g.* to pay for the benefit or to repay the loan), to the extent the cash or deferred arrangement restricts elective contributions to amounts available after such withholding from the employee's pay (after deduction of all applicable income and employment taxes);

(C) Any reduction in the employer's top-heavy contributions under section 416(c)(2) because of matching contributions that resulted from the elective contributions; or

(D) Any benefit that is provided at the employee's election under a plan described in section 125(d) in lieu of an

elective contribution under a qualified cash or deferred arrangement.

(ii) *Definition of other benefits.* For purposes of this paragraph (e)(6), other benefits include, but are not limited to, benefits under a defined benefit plan; nonelective contributions under a defined contribution plan; the availability, cost, or amount of health benefits; vacations or vacation pay; life insurance; dental plans; legal services plans; loans (including plan loans); financial planning services; subsidized retirement benefits; stock options; property subject to section 83; and dependent care assistance. Also, increases in salary and bonuses (other than those actually subject to the cash or deferred election) are benefits for purposes of this paragraph (e)(6). The ability to make after-tax employee contributions is a benefit, but that benefit is not contingent upon an employee's electing to make or not make elective contributions under the arrangement merely because the amount of elective contributions reduces dollar-for-dollar the amount of after-tax employee contributions that may be made. Additionally, benefits under any other plan or arrangement (whether or not qualified) are not contingent upon an employee's electing to make or not to make elective contributions under a cash or deferred arrangement merely because the elective contributions are or are not taken into account as compensation under the other plan or arrangement for purposes of determining benefits.

(iii) *Effect of certain statutory limits.* Any benefit under an excess benefit plan described in section 3(36) of the Employee Retirement Income Security Act of 1974 that is dependent on the employee's electing to make or not to make elective contributions is not treated as contingent.

(iv) *Nonqualified deferred compensation.* Participation in a nonqualified deferred compensation plan is treated as contingent for purposes of this paragraph (e)(6) only to the extent that an employee may receive additional deferred compensation under the nonqualified plan to the extent the employee makes or does not make elective contributions. Deferred compensation under a nonqualified plan of deferred compensation that is dependent on an employee's having made the maximum elective deferrals under section 402(g) or the maximum elective contributions permitted under the terms of the plan also is not treated as contingent.

(v) *Plan loans and distributions.* A loan or distribution of elective contributions is not a benefit conditioned on an employee's electing to make or not make elective contributions under the arrangement merely because the amount of the loan or distribution is based on the amount of the employee's account balance.

(vi) *Examples.* The following examples illustrate the application of this paragraph (e)(6):

Example 1. Employer T maintains a cash or deferred arrangement for all of its employees. Employer T also maintains a nonqualified deferred compensation plan for two highly paid executives, Employees R and C. Under the terms of the nonqualified deferred compensation plan, R and C are eligible to participate only if they do not make elective contributions under the cash or deferred arrangement. Participation in the nonqualified plan is a contingent benefit for purposes of this paragraph (e)(6), because R's and C's participation is conditioned on their electing not to make elective contributions under the cash or deferred arrangement.

Example 2. Employer T maintains a cash or deferred arrangement for all its employees. Employer T also maintains a nonqualified deferred compensation plan for two highly paid executives, Employees R and C. Under the terms of the arrangements, Employees R and C may defer a maximum of 10% of their compensation, and may allocate their deferral between the cash or deferred arrangement and the nonqualified deferred compensation plan in any way they choose (subject to the overall 10% maximum). Because the maximum deferral available under the nonqualified deferred compensation plan depends on the elective deferrals made under the cash or deferred arrangement, the right to participate in the nonqualified plan is a contingent benefit for purposes of paragraph (e)(6).

(7) *Plan provision requirement.* A plan that includes a cash or deferred arrangement satisfies this paragraph (e) only if it provides that the nondiscrimination requirements of section 401(k) will be met. Thus, the plan must provide for satisfaction of one of the specific alternatives described in paragraph (b)(1)(ii) of this section and, if with respect to that alternative there are optional choices, which of the optional choices will apply. For example, a plan that uses the ADP test of section 401(k)(3), as described in paragraph (b)(1)(ii)(A) of this section, must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ADP for eligible NHCEs for the first plan year is 3% or the ADP for the eligible NHCEs for the first plan year. Similarly, a plan that uses the safe harbor method of section 401(k)(12), as described in paragraph (b)(1)(ii)(B) of this section, must specify whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution and is not permitted to provide that ADP testing will be used if the requirements for the safe harbor are not satisfied. For purposes of this paragraph (e)(7), a plan may incorporate by reference the provisions of section 401(k)(3) and § 1.401(k)–2 if that is the nondiscrimination test being applied.

(f) *Effective dates*—(1) *General rule.* This section and §§ 1.401(k)–2 through 1.401(k)–6 apply to plan years that begin on or after the date that is 12 months after the issuance of these regulations in final form, except as otherwise provided in this paragraph (f).

(2) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers in effect on the date described in paragraph (f)(1) of this section, the provisions of this section and §§ 1.401(k)–2 through 1.401(k)–6 apply to the later of the first plan year beginning after the termination of the last such agreement or the plan year described in paragraph (f)(1) of this section.

§ 1.401(k)–2 ADP test.

(a) *Actual deferral percentage (ADP) test*—(1) *In general*—(i) *ADP test formula.* A cash or deferred arrangement satisfies the ADP test for a plan year only if—

(A) The ADP for the eligible HCEs for the plan year is not more than the ADP for the eligible NHCEs for the applicable year multiplied by 1.25; or

(B) The excess of the ADP for the eligible HCEs for the plan year over the ADP for the eligible NHCEs for the applicable year is not more than 2 percentage points, and the ADP for the eligible HCEs for the plan year is not more than the ADP for the eligible NHCEs for the applicable year multiplied by 2.

(ii) *HCEs as sole eligible employees.* If, for the applicable year for determining the ADP of the NHCEs for a plan year, there are no eligible NHCEs (*i.e,* all of the eligible employees under the cash or deferred arrangement for the applicable year are HCEs), the arrangement is deemed to satisfy the ADP test for the plan year.

(iii) *Special rule for early participation.* If a cash or deferred arrangement provides that employees are eligible to participate before they have completed the minimum age and service requirements of section 410(a)(1)(A), and if the plan applies section 410(b)(4)(B) in determining whether the cash or deferred arrangement meets the requirements of

section 410(b)(1), then in determining whether the arrangement meets the requirements under paragraph (a)(1) of this section, either—

(A) Pursuant to section 401(k)(3)(F), the ADP test is performed under the plan (determined without regard to disaggregation under § 1.410(b)–7(c)(3)), using the ADP for all eligible HCEs for the plan year and the ADP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A); or

(B) Pursuant to § 1.401(k)–1(b)(4), the plan is disaggregated into separate plans and the ADP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A).

(2) *Determination of ADP*—(i) *General rule.* The ADP for a group of eligible employees (either eligible HCEs or eligible NHCEs) for a plan year or applicable year is the average of the ADRs of the eligible employees in that group for that year. The ADP for a group of eligible employees is calculated to the nearest hundredth of a percentage point.

(ii) *Determination of applicable year under current year and prior year testing method.* The ADP test is applied using the prior year testing method or the current year testing method. Under the prior year testing method, the applicable year for determining the ADP for the eligible NHCEs is the plan year immediately preceding the plan year for which the ADP test is being performed. Under the prior year testing method, the ADP for the eligible NHCEs is determined using the ADRs for the eligible employees who were NHCEs in that preceding plan year, regardless of whether those NHCEs are eligible employees or NHCEs in the plan year for which the ADP test is being calculated. Under the current year testing method, the applicable year for determining the ADP for the eligible NHCEs is the same plan year as the plan year for which the ADP test is being performed. Under either method, the ADP for eligible HCEs is the average of the ADRs of the eligible HCEs for the plan year for which the ADP test is being performed. See paragraph (c) of this section for additional rules for the prior year testing method.

(3) *Determination of ADR*—(i) *General rule.* The ADR of an eligible employee for a plan year or applicable year is the sum of the employee's elective contributions taken into account with respect to such employee for the year, determined under the rules of paragraphs (a)(4) and (5) of this section, and the qualified nonelective contributions and qualified matching contributions taken into account with respect to such employee under paragraph (a)(6) of this section for the year, divided by the employee's compensation taken into account for the year. The ADR is calculated to the nearest hundredth of a percentage point. If no elective contributions, qualified nonelective contributions, or qualified matching contributions are taken into account under this section with respect to an eligible employee for the year, the ADR of the employee is zero.

(ii) *ADR of HCEs eligible under more than one arrangement*—(A) *General rule.* Pursuant to section 401(k)(3)(A), the ADR of an HCE who is an eligible employee in more than one cash or deferred arrangement of the same employer is calculated by treating all contributions with respect to such HCE under any such arrangement as being made under the cash or deferred arrangement being tested. Thus, the ADR for such an HCE is calculated by accumulating all contributions under any cash or deferred arrangement (other than a cash or deferred arrangement described in paragraph (a)(3)(ii)(B) of this section) that would be taken into account under this section for the plan year, if the cash or deferred arrangement under which the contribution was made applied this section and had the same plan year. For example, in the case of a plan with a 12-month plan year, the ADR for the plan year of that plan for an HCE who participates in multiple cash or deferred arrangements of the same employer is the sum of all contributions during such 12-month period that would be taken into account with respect to the HCE under all such arrangements in which the HCE is an eligible employee, divided by the HCE's compensation for that 12-month period (determined using the compensation definition for the plan being tested), without regard to the plan year of the other plans and whether those plans are satisfying this section or § 1.401(k)–3.

(B) *Plans not permitted to be aggregated.* Cash or deferred arrangements under plans that are not permitted to be aggregated under § 1.401(k)–1(b)(4) (determined without regard to the prohibition on aggregating plans with inconsistent testing methods set forth in § 1.401(k)–1(b)(4)(iii)(B) and the prohibition on aggregating plans with different plan years set forth in § 1.410(b)–7(d)(5)) are not aggregated under this paragraph (a)(3)(ii).

(iii) *Examples.* The following examples illustrate the application of this paragraph (a)(3):

Example 1. (i) Employee A, an HCE with compensation of $120,000, is eligible to make elective contributions under Plan S and Plan T, two profit-sharing plans maintained by Employer H with calendar year plan years, each of which includes a cash or deferred arrangement. During the current plan year, Employee A makes elective contributions of $6,000 to Plan S and $4,000 to Plan T.

(ii) Under each plan, the ADR for Employee A is determined by dividing Employee A's total elective contributions under both arrangements by Employee A's compensation taken into account under the plan for the year. Therefore, Employee A's ADR under each plan is 8.33% ($10,000/$120,000).

Example 2. (i) The facts are the same as in *Example 1,* except that Plan T defines compensation (for deferral and testing purposes) to exclude all bonuses paid to an employee. Plan S defines compensation (for deferral and testing purposes) to include bonuses paid to an employee. During the current year, Employee A's compensation included a $10,000 bonus. Therefore, Employee A's compensation under Plan T is $110,000 and Employee A's compensation under Plan S is $120,000.

(ii) Employee A's ADR under Plan T is 9.09% ($10,000/$110,000) and under Plan S, Employee A's ADR is 8.33% ($10,000/$120,000).

Example 3. (i) Employer J sponsors two profit-sharing plans, Plan U and Plan V, each of which includes a cash or deferred arrangement. Plan U's plan year begins on July 1 and ends on June 30. Plan V has a calendar year plan year. Compensation under both plans is limited to the participant's compensation during the period of participation. Employee B is an HCE who participates in both plans. Employee B's monthly compensation and elective contributions to each plan for the 2005 and 2006 calendar years are as follows:

Calendar year	Monthly compensation	Monthly elective contribution to Plan U	Monthly elective contribution to Plan V
2005	$10,000	$500	$400
2006	11,500	700	550

(ii) Under Plan U, Employee B's ADR for the plan year ended June 30, 2006, is equal to Employee B's total elective contributions under Plan U and Plan V for the plan year ending June 30, 2006 divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan U for the plan year ending June 30, 2006, is (($900 x 6) + ($1,250 × 6))/(($10,000 × 6) + ($11,500 × 6)), or 10%.

(iii) Under Plan V, Employee B's ADR for the plan year ended December 31, 2005, is equal to total elective contributions under Plan U and V for the plan year ending December 31, 2005, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan V for the plan year ending December 31, 2005, is ($10,800/$120,000), or 9%.

Example 4. (i) The facts are the same as *Example 3,* except that Employee B first becomes eligible to participate in Plan U on January 1, 2006.

(ii) Under Plan U, Employee B's ADR for the plan year ended June 30, 2006, is equal to Employee B's total elective contributions under Plan U and V for the plan year ending June 30, 2006, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan U for the plan year ending June 30, 2006, is (($400 × 6)+ ($1,250 x 6))/(($10,000 × 6) + ($11,500 × 6)), or 7.67%.

(4) *Elective contributions taken into account under the ADP test*—(i) *General rule.* An elective contribution is taken into account in determining the ADR for an eligible employee for a plan year or applicable year only if each of the following requirements is satisfied:

(A) The elective contribution is allocated to the eligible employee's account under the plan as of a date within that year. For purposes of this rule, an elective contribution is considered allocated as of a date within a year only if—

(*1*) The allocation is not contingent on the employee's participation in the plan or performance of services on any date subsequent to that date; and

(*2*) The elective contribution is actually paid to the trust no later than the end of the 12-month period immediately following the year to which the contribution relates.

(B) The elective contribution relates to compensation that either—

(1) Would have been received by the employee in the year but for the employee's election to defer under the arrangement; or

(*2*) Is attributable to services performed by the employee in the year and, but for the employee's election to defer, would have been received by the employee within 2½ months after the close of the year, but only if the plan so provides for elective contributions that relate to compensation that would have been received after the close of a year to be allocated to such prior year rather than the year in which the compensation would have been received.

(ii) *Elective contributions for partners and self-employed individuals.* For purposes of this paragraph (a)(4), a partner's distributive share of partnership income is treated as received on the last day of the partnership taxable year and a sole proprietor's compensation is treated as received on the last day of the individual's taxable year. Thus, an elective contribution made on behalf of a partner or sole proprietor is treated as allocated to the partner's account for the plan year that includes the last day of the partnership taxable year, provided the requirements of paragraph (a)(4)(i) of this section are met.

(iii) *Elective contributions for HCEs.* Elective contributions of an HCE must include any excess deferrals, as described in § 1.402(g)–1(a), even if those excess deferrals are distributed, pursuant to § 1.402(g)–1(e).

(5) *Elective contributions not taken into account under the ADP test*—(i) *General rule.* Elective contributions that do not satisfy the requirements of paragraph (a)(4)(i) of this section may not be taken into account in determining the ADR of an eligible employee for the plan year or applicable year with respect to which the contributions were made, or for any other plan year. Instead, the amount of the elective contributions must satisfy the requirements of section 401(a)(4) (without regard to the ADP test) for the plan year for which they are allocated under the plan as if they were nonelective contributions and were the only nonelective contributions for that year. See §§ 1.401(a)(4)–1(b)(2)(ii)(B) and 1.410(b)–7(c)(1).

(ii) *Elective contributions for NHCEs.* Elective contributions of an NHCE shall not include any excess deferrals, as described in § 1.402(g)–1(a), to the extent the excess deferrals are prohibited under section 401(a)(30). However, to the extent that the excess deferrals are not prohibited under section 401(a)(30), they are included in elective contributions even if distributed pursuant to § 1.402(g)–1(e).

(iii) *Elective contributions treated as catch-up contributions.* Elective contributions that are treated as catch-up contributions under section 414(v) because they exceed a statutory limit or employer-provided limit (within the meaning of § 1.414(v)–1(b)(1)) are not taken into account under paragraph (a)(4) of this section for the plan year for which the contributions were made, or for any other plan year.

(iv) *Elective contributions used to satisfy the ACP test.* Except to the extent necessary to demonstrate satisfaction of the requirement of § 1.401(m)–2(a)(6)(ii), elective contributions taken into account for the ACP test under § 1.401(m)–2(a)(6) are not taken into account under paragraph (a)(4) of this section.

(6) *Qualified nonelective contributions and qualified matching contributions that may be taken into account under the ADP test.* Qualified nonelective contributions and qualified matching contributions may be taken into account in determining the ADR for an eligible employee for a plan year or applicable year but only to the extent the contributions satisfy the following requirements.

(i) *Timing of allocation.* The qualified nonelective contribution or qualified matching contribution is allocated to the employee's account as of a date within that year within the meaning of paragraph (a)(4)(i)(A) of this section. Consequently, under the prior year testing method, in order to be taken into account in calculating the ADP for the eligible NHCEs for the applicable year, a qualified nonelective contribution or qualified matching contribution must be contributed no later than the end of the 12-month period immediately following the applicable year even though the applicable year is different than the plan year being tested.

(ii) *Requirement that amount satisfy section 401(a)(4).* The amount of nonelective contributions, including those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ACP test of section 401(m)(2) under § 1.401(m)–2(a)(6), satisfies the requirements of section 401(a)(4). *See* § 1.401(a)(4)–1(b)(2). The amount of nonelective contributions, excluding those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ACP test of section 401(m)(2) under § 1.401(m)–2(a)(6), satisfies the requirements of section 401(a)(4). *See* § 1.401(a)(4)–1(b)(2). In the case of an employer that is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the cash or deferred arrangement, the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(ii) must be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on an

employer-wide basis. Conversely, in the case of an employer that is treated as operating qualified separate lines of business, and does not apply the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the cash or deferred arrangement, then the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(ii) is not permitted to be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on that basis.

(iii) *Aggregation must be permitted.* The plan that contains the cash or deferred arrangement and the plan or plans to which the qualified nonelective contributions or qualified matching contributions are made, are plans that would be permitted to be aggregated under § 1.401(k)–1(b)(4). If the plan year of the plan that contains the cash or deferred arrangement is changed to satisfy the requirement under § 1.410(b)–7(d)(5) that aggregated plans have the same plan year, qualified nonelective contributions and qualified matching contributions may be taken into account in the resulting short plan year only if such qualified nonelective contributions and qualified matching contributions could have been taken into account under an ADP test for a plan with the same short plan year.

(iv) *Disproportionate contributions not taken into account*—(A) *General rule.* Qualified nonelective contributions cannot be taken into account for a plan year for an NHCE to the extent such contributions exceed the product of that NHCE's compensation and the greater of 5% or two times the plan's representative contribution rate. Any qualified nonelective contribution taken into account under an ACP test under § 1.401(m)–2(a)(6) (including the determination of the representative contribution rate for purposes of § 1.401(m)–2(a)(6)(v)(B)), is not permitted to be taken into account for purposes of this paragraph (a)(6) (including the determination of the representative contribution rate under paragraph (a)(6)(iv)(B) of this section).

(B) *Definition of representative contribution rate.* For purposes of this paragraph (a)(6)(iv), the plan's representative contribution rate is the lowest applicable contribution rate of any eligible NHCE among a group of eligible NHCEs that consists of half of all eligible NHCEs for the plan year (or, if greater, the lowest applicable contribution rate of any eligible NHCE in the group of all eligible NHCEs for the plan year and who is employed by the employer on the last day of the plan year).

(C) *Definition of applicable contribution rate.* For purposes of this paragraph (a)(6)(iv), the applicable contribution rate for an eligible NHCE is the sum of the qualified matching contributions taken into account under this paragraph (a)(6) for the eligible NHCE for the plan year and the qualified nonelective contributions made for that eligible NHCE for the plan year, divided by that eligible NHCE's compensation for the same period.

(v) *Qualified matching contributions.* Qualified matching contributions satisfy this paragraph (a)(6) only to the extent that such qualified matching contributions are matching contributions that are not precluded from being taken into account under the ACP test for the plan year under the rules of § 1.401(m)–2(a)(5)(ii).

(vi) *Contributions only used once.* Qualified nonelective contributions and qualified matching contributions can not be taken into account under this paragraph (a)(6) to the extent such contributions are taken into account for purposes of satisfying any other ADP test, any ACP test, or the requirements of § 1.401(k)–3, 1.401(m)–3 or 1.401(k)–4. Thus, for example, matching contributions that are made pursuant to § 1.401(k)–3(c) cannot be taken into account under the ADP test. Similarly, if a plan switches from the current year testing method to the prior year testing method pursuant to § 1.401(k)–2(c), qualified nonelective contributions that are taken into account under the current year testing method for a year may not be taken into account under the prior year testing method for the next year.

(7) *Examples.* The following examples illustrate the application of this paragraph (a):

Example 1. (i) Employer X has three employees, A, B, and C. Employer X sponsors a profit-sharing plan (Plan Z) that includes a cash or deferred arrangement. Each year, Employer X determines a bonus attributable to the prior year. Under the cash or deferred arrangement, each eligible employee may elect to receive none, all or any part of the bonus in cash. X contributes the remainder to Plan Z. The portion of the bonus paid in cash, if any, is paid 2 months after the end of the plan year and thus is included in compensation for the following plan year. Employee A is an HCE, while Employees B and C are NHCEs. The plan uses the current year testing method and defines compensation to include elective contributions and bonuses paid during each plan year. In February of 2005, Employer X determined that no bonuses will be paid for 2004. In February of 2006, Employer X provided a bonus for each employee equal to 10% of regular compensation for 2005. For the 2005 plan year, A, B, and C have the following compensation and make the following elections:

Employee	Compensation	Elective contribution
A	$100,000	$4,340
B	60,000	2,860
C	45,000	1,250

(ii) For each employee, the ratio of elective contributions to the employee's compensation for the plan year is:

Employee	Ratio of elective contribution to compensation	ADR
A	$4,340/$100,000	4.34%
B	2,860/60,000	4.77
C	1,250/45,000	2.78

(iii) The ADP for the HCEs (Employee A) is 4.34%. The ADP for the NHCEs is 3.78% ((4.77% + 2.78%)/2). Because 4.34% is less than 4.73% (3.78% multiplied by 1.25), the plan satisfies the ADP test under paragraph (a)(1)(i) of this section.

Example 2. (i) The facts are the same as in *Example 1,* except that elective contributions are made pursuant to a salary reduction agreement throughout the plan year, and no bonuses are paid. As provided by section 414(s)(2), Employer X includes elective contributions in compensation. During the year, B and C defer the same amount as in *Example 1,* but A defers $5,770. Thus, the compensation and elective contributions for A, B, and C are:

Employee	Gross compensation	Elective contributions	ADR
A	$100,000	$5,770	5.77%
B	60,000	2,860	4.77
C	45,000	1,250	2.78

(ii) The ADP for the HCEs (Employee A) is 5.77%. The ADP for the NHCEs is 3.78% ((4.77% + 2.78%)/2). Because 5.77% exceeds 4.73% (3.78% x 1.25), the plan does not satisfy the ADP test under paragraph (a)(1)(i) of this section. However, because the ADP for the HCEs does not exceed the ADP for the NHCEs by more than 2 percentage points and the ADP for the HCEs does not exceed the ADP for the NHCEs multiplied by 2 (3.78% x 2 = 7.56%), the plan satisfies the ADP test under paragraph (a)(1)(ii) of this section.

Example 3. (i) Employees D through L are eligible employees in Plan T, a profit-sharing plan that contains a cash or deferred arrangement. The plan is a calendar year plan that uses the prior year testing method. Plan T provides that elective contributions are included in compensation (as provided under section 414(s)(2)). Each eligible employee may elect to defer up to 6% of compensation under the cash or deferred arrangement. Employees D and E are HCEs. The compensation, elective contributions, and ADRs of Employees D and E for the 2006 plan year are shown below:

Employee	Compensation for 2006 plan year	Elective contributions for 2006 plan year	ADR for 2006 plan year
D	$100,000	$10,000	10%
E	95,000	4,750	5

(ii) During the 2005 plan year, Employees F through L were eligible NHCEs. The compensation, elective contributions and ADRs of Employees F through L for the 2005 plan year are shown in the following table:

Employee	Compensation for 2005 plan year	Elective contributions for 2005 plan year	ADR for 2005 plan year
F	$60,000	$3,600	6%
G	40,000	1,600	4
H	30,000	1,200	4
I	20,000	600	3
J	20,000	600	3
K	10,000	300	3
L	5,000	150	3

(iii) The ADP for 2006 for the HCEs is 7.5%. Because Plan T is using the prior year testing method, the applicable year for determining the NHCE ADP is the prior plan year (*i.e.,* 2005). The NHCE ADP is determined using the ADRs for NHCEs eligible during the prior plan year (without regard to whether they are eligible under the plan during the plan year). The ADP for the NHCEs is 3.71% (the sum of the individual ADRs, 26%, divided by 7 employees). Because 7.5% exceeds 4.64% (3.71% x 1.25), Plan T does not satisfy the ADP test under paragraph (a)(1)(i) of this section. In addition, because the ADP for the HCEs exceeds the ADP for the NHCEs by more than 2 percentage points, Plan T does not satisfy the ADP test under paragraph (a)(1)(ii) of this section. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 4. (i) Plan U is a calendar year profit-sharing plan that contains a cash or deferred arrangement and uses the current year testing method. Plan U provides that elective contributions are included in compensation (as provided under section 414(s)(2)). The following amounts are contributed under Plan U for the 2006 plan year: (A) QNECs equal to 2% of each employee's compensation; (B) Contributions equal to 6% of each employee's compensation that are not immediately vested under the terms of the plan; (C) 3% of each employee's compensation that the employee may elect to receive as cash or to defer under the plan. Both types of nonelective contributions are made for the HCEs (employees M and N) and the NHCEs (employees O through S) for the plan year and are contributed after the end of the plan year and before the end of the following plan year. In addition, neither type of nonelective contributions is used for any other ADP or ACP test.

(ii) For the 2006 plan year, the compensation, elective contributions, and actual deferral ratios of employees M through S are shown in the following table:

Employee	Compensation	Elective contributions	Actual deferral ratio
M	$100,000	$3,000	3%
N	100,000	2,000	2
O	60,000	1,800	3

Employee	Compensation	Elective contributions	Actual deferral ratio
P	40,000	0	0
Q	30,000	0	0
R	5,000	0	0
S	20,000	0	0

(iii) The elective contributions alone do not satisfy the ADP test of section 401(k)(3) and paragraph (a)(1) of this section because the ADP for the HCEs, consisting of employees M and N, is 2.5% and the ADP for the NHCEs is 0.6%.

(iv) The 2% QNECs satisfies the timing requirement of paragraph (a)(6)(i) of this section because it is paid within 12-month after the plan year for which allocated. All nonelective contributions also satisfy the requirements relating to section 401(a)(4) set forth in paragraph (a)(6)(ii) of this section (because all employees receive an 8% nonelective contribution and the nonelective contributions excluding the QNECs is 6% for all employees). In addition, the QNECs are not disproportionate under paragraph (a)(6)(iv) of this section because no QNEC for an NHCE exceeds the product of the plan's applicable contribution rate (2%) and that NHCE's compensation.

(v) Because the rules of paragraph (a)(6) of this section are satisfied, the 2% QNECs may be taken into account in applying the ADP test of section 401(k)(3) and paragraph (a)(1) of this section. The 6% nonelective contributions, however, may not be taken into account because they are not QNECs.

(vi) If the 2% QNECs are taken into account, the ADP for the HCEs is 4.5%, and the actual deferral percentage for the NHCEs is 2.6%. Because 4.5% is not more than two percentage points greater than 2.6 percent, and not more than two times 2.6, the cash or deferred arrangement satisfies the ADP test of section 401(k)(3) under paragraph (a)(1)(ii) of this section.

Example 5. (i) The facts are the same as *Example 4,* except the plan uses the prior year testing method. In addition, the NHCE ADP for the 2005 plan year (the prior plan year) is 0.8% and no QNECs are contributed for the 2005 plan year during 2005 or 2006.

(ii) In 2007, it is determined that the elective contributions alone do not satisfy the ADP test of section 401(k)(3) and paragraph (a)(1) of this section for 2006 because the 2006 ADP for the eligible HCEs, consisting of employees M and N, is 2.5% and the 2005 ADP for the eligible NHCEs is 0.8%. An additional QNEC of 2% of compensation is made for each eligible NHCE in 2007 and allocated for 2005.

(iii) The 2% QNECs that are made in 2007 and allocated for the 2005 plan year do not satisfy the timing requirement of paragraph (a)(6)(i) of this section for the applicable year for the 2005 plan year because they were not contributed before the last day of the 2006 plan year. Accordingly, the 2% QNECs do not satisfy the rules of paragraph (a)(6) of this section and may not be taken into account in applying the ADP test of section 401(k)(3) and paragraph (a)(1) of this section for the 2006 plan year. The cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 6. (i) The facts are the same as *Example 4,* except that the ADP for the HCEs is 4.6% and there is no 6% nonelective contribution under the plan. The employer would like to take into account the 2% QNEC in determining the ADP for the NHCEs but not in determining the ADP for the HCEs.

(ii) The elective contributions alone fail the requirements of section 401(k) and paragraph (a)(1) of this section because the HCE ADP for the plan year (4.6%) exceeds 0.75% (0.6% × 1.25) and 1.2% (0.6% × 2).

(iii) The 2% QNECs may not be taken into account in determining the ADP of the NHCEs because they fail to satisfy the requirements relating to section 401(a)(4) set forth in paragraph (a)(6)(ii) of this section. This is because the amount of nonelective contributions, excluding those QNECs that would be taken into account under the ADP test, would be 2% of compensation for the HCEs and 0% for the NHCEs. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 7. (i) The facts are the same as *Example 6,* except that Employee R receives a QNEC in an amount of $500 and no QNECs are made on behalf of the other employees.

(ii) If the QNEC could be taken into account under paragraph (a)(6) of this section, the ADP for the NHCEs would be 2.6% and the plan would satisfy the ADP test. The QNEC is disproportionate under paragraph (a)(6)(iv) of this section, and cannot be taken into account under paragraph (a)(6) of this section, to the extent it exceeds the greater of 5% and two times the plan's representative contribution rate (0%), multiplied by Employee R's compensation. The plan's representative contribution rate is 0% because it is the lowest applicable contribution rate among a group of NHCEs that is at least half of all NHCEs, or all the NHCEs who are employed on the last day of the plan year. Therefore, the QNEC may be taken into account under the ADP test only to the extent it does not exceed 5% times Employee R's compensation (or $250) and the cash or deferred arrangement fails to satisfy the ADP test and must be corrected under paragraph (b) of this section.

Example 8. (i) The facts are the same as in *Example 4* except that the plan changes from the current year testing method to the prior year testing method for the following plan year (2006 plan year). The ADP for the HCEs for the 2006 plan year is 3.5%.

(ii) The 2% QNECs may not be taken into account in determining the ADP for the NHCEs for the applicable year (2005 plan year) in satisfying the ADP test for the 2006 plan year because they were taken into account in satisfying the ADP test for the 2005 plan year. Accordingly, the NHCE ADP for the applicable year is 0.6%. The elective contributions for the plan year fail the requirements of section 401(k) and paragraph (a)(1) of this section because the HCE ADP for the plan year (3.5%) exceeds the ADP limit of 1.2% (the greater of 0.75% (0.6% × 1.25) and 1.2% (0.6% × 2)), determined using the applicable year ADP for the NHCEs. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 9. (i)(A) Employer N maintains Plan X, a profit sharing plan that contains a cash or deferred arrangement and that uses the current year testing method. Plan X provides for employee contributions, elective contributions, and matching contributions. Matching contributions on behalf of nonhighly compensated employees are qualified matching contributions (QMACs) and are contributed during the 2005 plan year. Matching contributions on behalf of highly compensated employees are not QMACs, because they fail to satisfy the nonforfeitability requirement of § 1.401(k)–1(c). The elective contributions and matching contributions with respect to HCEs for the 2005 plan year are shown in the following table:

	Elective contributions	Total matching contributions	Matching contributions that are not QMACs	QMACs
Highly compensated employees	15%	5%	5%	0%

(B) The elective contributions and matching contributions with respect to the NHCEs for the 2005 plan year are shown in the following table:

	Elective contributions	Total matching contributions	Matching contributions that are not QMACs	QMACs
Nonhighly compensated employees	11%	4%	0%	4%

(ii) The plan fails to satisfy the ADP test of section 401(k)(3)(A) and paragraph (a)(1) of this section because the ADP for HCEs (15%) is more than 125% of the ADP for NHCEs (11%), and more than 2 percentage points greater than 11%. However, the plan provides that QMACs may be used to meet the requirements of section 401(k)(3)(A)(ii) provided that they are not used for any other ADP or ACP test. QMACs equal to 1% of compensation are taken into account for each NHCE in applying the ADP test. After this adjustment, the applicable ADP and ACP (taking into account the provisions of § 1.401(m)–2(a)(5)(ii)) for the plan year are as follows:

	Actual deferral percentage	Actual contribution percentage
HCEs	15	5
Nonhighly compensated employees	12	3

(iii) The elective contributions and QMACs taken into account for purposes of the ADP test of section 401(k)(3) satisfy the requirements of section 401(k)(3)(A)(ii) under paragraph (a)(1)(ii) of this section because the ADP for HCEs (15%) is not more than the ADP for NHCEs multiplied by 1.25 (12% × 1.25 = 15%).

(b) *Correction of excess contributions*—(1) *Permissible correction methods*—(i) *In general.* A cash or deferred arrangement does not fail to satisfy the requirements of section 401(k)(3) and paragraph (a)(1) of this section if the employer, in accordance with the terms of the plan that includes the cash or deferred arrangement, uses any of the following correction methods—

(A) *Qualified nonelective contributions or qualified matching contributions.* The employer makes qualified nonelective contributions or qualified matching contributions that are taken into account under this section and, in combination with other amounts taken into account under paragraph (a) of this section, allow the cash or deferred arrangement to satisfy the requirements of paragraph (a)(1) of this section.

(B) *Excess contributions distributed.* Excess contributions are distributed in accordance with paragraph (b)(2) of this section.

(C) *Excess contributions recharacterized.* Excess contributions are recharacterized in accordance with paragraph (b)(3) of this section.

(ii) *Combination of correction methods.* A plan may provide for the use of any of the correction methods described in paragraph (b)(1)(i) of this section, may limit elective contributions in a manner designed to prevent excess contributions from being made, or may use a combination of these methods, to avoid or correct excess contributions. A plan may require or permit an HCE to elect whether any excess contributions are to be recharacterized or distributed. If the plan uses a combination of correction methods, any contribution made under paragraph (b)(1)(i)(A) of this section must be taken into account before application of the correction methods in paragraph (b)(1)(i)(B) or (C) of this section.

(iii) *Exclusive means of correction.* A failure to satisfy the requirements of paragraph (a)(1) of this section may not be corrected using any method other than the ones described in paragraphs (b)(1)(i) and (ii) of this section. Thus, excess contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. In addition, excess contributions may not be corrected using the retroactive correction rules of § 1.401(a)(4)–11(g). *See* § 1.401(a)(4)–11(g)(3)(vii) and (5).

(2) *Corrections through distribution*—(i) *General rule.* This paragraph (b)(2) contains the rules for correction of excess contributions through a distribution from the plan. Correction through a distribution generally involves a 4 step process. First, the plan must determine, in accordance with paragraph (b)(2)(ii) of this section, the total amount of excess contributions that must be distributed under the plan. Second, the plan must apportion the total amount of excess contributions among HCEs in accordance with paragraph (b)(2)(iii) of this section. Third, the plan must determine the income allocable to excess contributions in accordance with paragraph (b)(2)(iv) of this section. Finally, the plan must distribute the apportioned excess contributions and allocable income in accordance with paragraph (b)(2)(v) of this section. Paragraph (b)(2)(vi) of this section provides rules relating to the tax treatment of these distributions. Paragraph (b)(2)(vii) provides other rules relating to these distributions.

(ii) *Calculation of total amount to be distributed.* The following procedures must be used to determine the total amount of the excess contributions to be distributed—

(A) *Calculate the dollar amount of excess contributions for each HCE.* The amount of excess contributions attributable to a given HCE for a plan year is the amount (if any) by which the HCE's contributions taken into account under this section must be reduced for the HCE's ADR to equal the highest permitted ADR under the plan. To calculate the highest permitted ADR under a plan, the ADR of the HCE with the highest ADR is reduced by the amount required to cause that HCE's ADR to equal the ADR of the HCE with the next highest ADR. If a lesser reduction would enable the arrangement to satisfy the requirements of paragraph (b)(2)(ii)(C) of this section, only this lesser reduction is used in determining the highest permitted ADR.

(B) *Determination of the total amount of excess contributions.* The process described in paragraph (b)(2)(ii)(A) of this section must be repeated until the arrangement would satisfy the requirements of paragraph (b)(2)(ii)(C) of this section. The sum of all reductions for all HCEs determined under paragraph (b)(2)(ii)(A) of this section is the total amount of excess contributions for the plan year.

(C) *Satisfaction of ADP.* A cash or deferred arrangement satisfies this paragraph (b)(2)(ii)(C) if the arrangement would satisfy the requirements of paragraph (a)(1)(ii) of this section if the ADR for each HCE were determined after the reductions described in paragraph (b)(2)(ii)(A) of this section.

(iii) *Apportionment of total amount of excess contributions among the HCEs.* The following procedures must be used

in apportioning the total amount of excess contributions determined under paragraph (b)(2)(ii) of this section among the HCEs:

(A) *Calculate the dollar amount of excess contributions for each HCE.* The contributions of the HCE with the highest dollar amount of contributions taken into account under this section are reduced by the amount required to cause that HCE's contributions to equal the dollar amount of the contributions taken into account under this section for the HCE with the next highest dollar amount of contributions taken account under this section. If a lesser apportionment to the HCE would enable the plan to apportion the total amount of excess contributions, only the lesser apportionment would apply.

(B) *Limit on amount apportioned to any individual.* For purposes of this paragraph (b)(2)(iii), the amount of contributions taken into account under this section with respect to an HCE who is an eligible employee in more than one plan of an employer is determined by taking into account all contributions otherwise taken into account with respect to such HCE under any plan of the employer during the plan year of the plan being tested as being made under the plan being tested. However, the amount of excess contributions apportioned for a plan year with respect to any HCE must not exceed the amount of contributions actually contributed to the plan for the HCE for the plan year. Thus, in the case of an HCE who is an eligible employee in more than one plan of the same employer to which elective contributions are made and whose ADR is calculated in accordance with paragraph (a)(3)(ii) of this section, the amount required to be distributed under this paragraph (b)(2)(iii) shall not exceed the contributions actually contributed to the plan and taken into account under this section for the plan year.

(C) *Apportionment to additional HCEs.* The procedure in paragraph (b)(2)(iii)(A) of this section must be repeated until the total amount of excess contributions determined under paragraph (b)(2)(ii) of this section have been apportioned.

(iv) *Income allocable to excess contributions—(A) General rule.* The income allocable to excess contributions is equal to the sum of the allocable gain or loss for the plan year and, to the extent the excess contributions are or will be credited with allocable gain or loss for the period after the close of the plan year (gap period), the allocable gain or loss for the gap period.

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participant's accounts. See § 1.401(a)(4)–1(c)(8).

(C) *Alternative method of allocating plan year income.* A plan may allocate income to excess contributions for the plan year by multiplying the income for the plan year allocable to the elective contributions and other amounts taken account under this section (including contributions made for the plan year), by a fraction, the numerator of which is the excess contributions for the employee for the plan year, and the denominator of which is the account balance attributable to elective contributions and other contributions taken into account under this section as of the beginning of the plan year (including any additional amount of such contributions made for the plan year).

(D) *Safe harbor method of allocating gap period income.* A plan may use the safe harbor method in this paragraph (b)(2)(iv)(D) to determine income on excess contributions for the gap period. Under this safe harbor method, income on excess contributions for the gap period is equal to 10% of the income allocable to excess contributions for the plan year that would be determined under paragraph (b)(2)(iv)(C) of this section, multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of a month is treated as made on the last day of the preceding month and a distribution made after the fifteenth day of a month is treated as made on the last day of the month.

(E) *Alternative method for allocating plan year and gap period income.* A plan may determine the allocable gain or loss for the aggregate of the plan year and the gap period by applying the alternative method provided by paragraph (b)(2)(iv)(C) of this section to this aggregate period. This is accomplished by substituting the income for the plan year and the gap period for the income for the plan year and by substituting the contributions taken into account under this section for the plan year and the gap period for the contributions taken account under this section for the plan year in determining the fraction that is multiplied by that income.

(v) *Distribution.* Within 12 months after the close of the plan year in which the excess contribution arose, the plan must distribute to each HCE the excess contributions apportioned to such HCE under paragraph (b)(2)(iii) of this section and the allocable income. Except as otherwise provided in this paragraph (b)(2)(v) and paragraph (b)(4)(i) of this section, a distribution of excess contributions must be in addition to any other distributions made during the year and must be designated as a corrective distribution by the employer. In the event of a complete termination of the plan during the plan year in which an excess contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of an HCE is distributed prior to when the plan makes a distribution of excess contributions in accordance with this paragraph (b)(2), the distribution is deemed to have been a corrective distribution of excess contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(vi) *Tax treatment of corrective distributions*—(A) *General rule.* Except as provided in paragraph (b)(2)(vi)(B) of this section, a corrective distribution of excess contributions (and income) that is made within 2½ months after the end of the plan year for which the excess contributions were made is includible in the employee's gross income on the earliest date any elective contributions by the employee during the plan year would have been received by the employee had the employee originally elected to receive the amounts in cash. A corrective distribution of excess contributions (and income) that is made more than 2½ months after the end of the plan year for which the contributions were made is includible in the employee's gross income in the employee's taxable year in which distributed. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t). *See* paragraph (b)(4) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year. *See also* § 1.402(c)–2, A–4 for restrictions on rolling over distributions that are excess contributions.

(B) *Rule for de minimis distributions.* If the total amount of excess contributions, determined under this paragraph (b)(2), and excess aggregate contributions determined under § 1.401(m)–2(b)(2) distributed to a

recipient under a plan for any plan year is less than $100 (excluding income), a corrective distribution of excess contributions (and income) is includible in the gross income of the recipient in the taxable year of the recipient in which the corrective distribution is made.

(vii) *Other rules*—(A) *No employee or spousal consent required.* A corrective distribution of excess contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(B) *Treatment of corrective distributions as elective contributions.* Excess contributions are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan.

(C) *No reduction of required minimum distribution.* A distribution of excess contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9). *See* § 1.401(a)(9)–5, Q&A–9(b).

(D) *Partial distributions.* Any distribution of less than the entire amount of excess contributions (and allocable income) with respect to any HCE is treated as a pro rata distribution of excess contributions and allocable income.

(viii) *Examples.* The following examples illustrate the application of this paragraph (b)(2). For purposes of these examples, none of the plans provide for catch-up contributions under section 414(v). The examples are as follows:

Example 1. (i) Plan P, a calendar year profit-sharing plan that includes a cash or deferred arrangement, provides for distribution of excess contributions to HCEs to the extent necessary to satisfy the ADP test. Employee A, an HCE, has elective contributions of $12,000 and $200,000 in compensation, for an ADR of 6%, and Employee B, a second HCE, has elective contributions of $8,960 and compensation of $128,000, for an ADR of 7%. The ADP for the NHCEs is 3%. Under the ADP test, the ADP of the two HCEs under the plan may not exceed 5% (*i.e.*, 2 percentage points more than the ADP of the NHCEs under the plan). The ADP for the 2 HCEs under the plan is 6.5%. Therefore, there must be a correction of excess contributions.

(ii) The total amount of excess contributions for the HCEs is determined under paragraph (b)(2)(ii) of this section as follows: the elective contributions of Employee B (the HCE with the highest ADR) are reduced by $1,280 in order to reduce his ADR to 6% ($7,680/$128,000), which is the ADR of Employee A.

(iii) Because the ADP of the HCEs determined after the $1,280 reduction to Employee B still exceeds 5%, further reductions in elective contributions are necessary in order to reduce the ADP of the HCEs to 5%. The elective contributions of Employee A and Employee B are each reduced by 1% of compensation ($2,000 and $1,280 respectively). Because the ADP of the HCEs determined after the reductions equals 5%, the plan would satisfy the requirements of (a)(1)(ii) of this section.

(iv) The total amount of excess contributions ($4,560 = $1,280 + $2,000 + $1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. Therefore, Employee A is apportioned $3,040 (the amount required to cause Employee A's elective contributions to equal the next highest dollar amount of elective contributions).

(v) Because the total amount of excess contributions has not been apportioned, further apportionment is necessary. The balance ($1,520) of the total amount of excess contributions is apportioned equally among Employee A and Employee B ($760 to each).

(vi) Therefore, the cash or deferred arrangement will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess contributions equal to $3,800 ($3,040 + $760) and allocable income and Employee B receives a corrective distribution of $760 and allocable income.

Example 2. (i) The facts are the same as in *Example 1*, except Employee A's ADR is based on $3,000 of elective contributions to this plan and $9,000 of elective contributions to another plan of the employer.

(ii) The total amount of excess contributions ($4,560 = $1,280 + $2,000 + $1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. The amount of elective contributions for Employee A is $12,000. Therefore, Employee A is apportioned $3,040 (the amount required to cause Employee A's elective contributions to equal the next highest dollar amount of elective contributions). However, pursuant to paragraph (b)(2)(iii)(B) of this section, no more than the amount actually contributed to the plan may be apportioned to an HCE. Accordingly, no more than $3,000 may be apportioned to Employee A. Therefore, the remaining $1,560 must be apportioned to Employee B.

(ii) The cash or deferred arrangement will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess contributions equal to $3,000 (total amount of elective contributions actually contributed to the plan for Employee A) and allocable income and Employee B receives a corrective distribution of $1,560 and allocable income.

Example 3. (i) The facts are the same as in *Example 1.* The plan allocates income on a daily basis. The corrective distributions are made in February 2007. The excess contribution that must be distributed to Employee A as a corrective distribution is $3,800. This amount must be increased (or decreased) to reflect gains (or losses) allocable to that amount during the 2006 plan year. The plan uses a reasonable method that satisfies paragraph (b)(2)(iv)(B) of this section to determine the gain during the 2006 plan year allocable to the $3,800 as $145. Therefore, as of the end of the 2006 plan year, the amount of corrective distribution that is required would be $3,945.

(ii) Because the plan allocates income on a daily basis, excess contributions are credited with gain or loss during the gap period. Therefore, the corrective distribution must include income allocable to $3,945 through the date of distribution. For the period from January 1 through the date of distribution, the income allocable to $3,945 is $105. Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if Employee A receives a corrective distribution of $4,050.

Example 4. (i) The facts are the same as in *Example 1.* The plan determines plan year income using the alternative method for calculating income provided in paragraph (b)(2)(iv)(C) of this section and using the portion of the participant's account attributable to elective contributions, including elective contributions made for the plan year. The plan uses the safe harbor method provided in paragraph (b)(2)(iv)(D) of this section for allocating gap period income. The corrective distribution is made during the last week of February 2007. At the beginning of the 2006 plan year, $100,000 of Employee A's plan account was attributable to elective contributions. During the 2006 plan year, $10,000 in elective contributions were contributed to the plan for Employee A. The income allocable to Employee A's account attributable to elective contributions for the 2006 plan year is $8,000.

(ii) Therefore, the plan year income allocable to the $3,800 corrective distribution for Employee A is $266.65 ($8,000 multiplied by $3,800 divided by $110,000). Therefore, as of the end of the 2006 plan year, the amount of corrective distribution that is required is $4,066.65. This amount must be increased by the gap period income of $53.32 (10% multiplied by $266.65 (2006 plan year income attributable to the excess contribution) multiplied by 2 (number of calendar months since end of 2006 plan year). Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if Employee A receives a corrective distribution of $4,119.97.

Example 5. (i) The facts are the same as in *Example 4,* except that the plan provides for quarterly valuations based on the account balance at the end of the quarter.

(ii) Because the plan's method for allocating income does not allocate any income to amounts distributed during the quarter, Employee A will not be credited with an allocation of income with respect to the amount distributed. Accordingly, Plan P need not plan adjust the distribution of excess contribution for income during the gap period and thus satisfies paragraph (a)(1) of this section if Employee A receives a corrective distribution of $4,066.65.

(3) *Recharacterization of excess contributions*—(i) *General rule.* Excess contributions are recharacterized in accordance with this paragraph (b)(3) only if the excess contributions that would have to be distributed under (b)(2) of this section if the plan was correcting through distribution of excess contributions are recharacterized as described in paragraph (b)(3)(ii) of this section, and all of the conditions set forth in paragraph (b)(3)(iii) of this section are satisfied.

(ii) *Treatment of recharacterized excess contributions.* Recharacterized excess contributions are includible in the employee's gross income as if such amounts were distributed under paragraph (b)(2) of this section. The recharacterized excess contributions must be treated as employee contributions for purposes of section 72, sections 401(a)(4) and 401(m). This requirement is not treated as satisfied unless the payor or plan administrator reports the recharacterized excess contributions as employee contributions to the Internal Revenue Service and the employee by timely providing such Federal tax forms and accompanying instructions and timely taking such other action as prescribed by the Commissioner in revenue rulings, notices and other guidance published in the Internal Revenue Bulletin (*see* 601.601(d)(2) of this chapter) as well as the applicable federal tax forms and accompanying instructions.

(iii) *Additional rules*—(A) *Time of recharacterization.* Excess contributions may not be recharacterized under this paragraph (b)(3) after 2½ months after the close of the plan year to which the recharacterization relates. Recharacterization is deemed to have occurred on the date on which the last of those HCEs with excess contributions to be recharacterized is notified in accordance with paragraph (b)(3)(ii) of this section.

(B) *Employee contributions must be permitted under plan.* The amount of recharacterized excess contributions, in combination with the employee contributions actually made by the HCE, may not exceed the maximum amount of employee contributions (determined without regard to the ACP test of section 401(m)(2)) permitted under the provisions of the plan as in effect on the first day of the plan year.

(C) *Treatment of recharacterized excess contributions.* Recharacterized excess contributions continue to be treated as employer contributions for all other purposes under the Internal Revenue Code, including sections 401(a) (other than sections 401(a)(4) and 401(m)), 404, 409, 411, 412, 415, 416, and 417. Thus, for example, recharacterized excess contributions remain subject to the requirements of § 1.401(k)–1(c) and (d); must be deducted under section 404; and are treated as employer contributions described in section 415(c)(2)(A) and § 1.415–6(b).

(4) *Rules applicable to all corrections*—(i) *Coordination with distribution of excess deferrals*—(A) *Treatment of excess deferrals that reduce excess contributions.* The amount of excess contributions (and allocable income) to be distributed under paragraph (b)(2) of this section or the amount of excess contributions recharacterized under paragraph (b)(3) of this section with respect to an employee for a plan year, is reduced by any amounts previously distributed to the employee from the plan to correct excess deferrals for the employee's taxable year ending with or within the plan year in accordance with section 402(g)(2).

(B) *Treatment of excess contributions that reduce excess deferrals.* Under § 1.402(g)–1(e), the amount required to be distributed to correct an excess deferral to an employee for a taxable year is reduced by any excess contributions (and allocable income) previously distributed or excess contributions recharacterized with respect to the employee for the plan year beginning with or within the taxable year. The amount of excess contributions includible in the gross income of the employee, and the amount of excess contributions reported by the payer or plan administrator as includible in the gross income of the employee, does not include the amount of any reduction under § 1.402(g)–1(e)(6).

(ii) *Forfeiture of match on distributed excess contributions.* A matching contribution is taken into account under section 401(a)(4) even if the match is with respect to an elective contribution that is distributed or recharacterized under this paragraph (b). This requires that, after correction of excess contributions, each level of matching contributions be currently and effectively available to a group of employees that satisfies section 410(b). *See* § 1.401(a)(4)–4(e)(3)(iii)(G). Thus, a plan that provides the same rate of matching contributions to all employees will not meet the requirements of section 401(a)(4) if elective contributions are distributed under this paragraph (b) to HCEs to the extent needed to meet the requirements of section 401(k)(3), while matching contributions attributable to those elective contributions remain allocated to the HCEs' accounts. Under section 411(a)(3)(G) and § 1.411(a)–4(b)(7), a plan may forfeit matching contributions attributable to excess contributions, excess aggregate contributions or excess deferrals to avoid a violation of section 401(a)(4). See also § 1.401(a)(4)–11(g)(vii)(B) regarding the use of additional allocations to the accounts of NHCEs for the purpose of correcting a discriminatory rate of matching contributions.

(iii) *Permitted forfeiture of QMAC.* Pursuant to section 401(k)(8)(E), a qualified matching contribution is not treated as forfeitable under § 1.401(k)–1(c) merely because under the plan it is forfeited in accordance with paragraph (b)(4)(ii) of this section.

(iv) *No requirement for recalculation.* If excess contributions are distributed or recharacterized in accordance with paragraphs (b)(2) and (3) of this section, the cash or deferred arrangement is treated as meeting the nondiscrimination test of section 401(k)(3) regardless of whether the ADP for the HCEs, if recalculated after the distributions or recharacterizations, would satisfy section 401(k)(3).

(v) *Treatment of excess contributions that are catch-up contributions.* A cash or deferred arrangement does not fail to meet the requirements of section 401(k)(3) and paragraph (a)(1) of this section merely because excess contributions that are catch-up contributions because they exceed the ADP limit, as described in § 1.414(v)–1(b)(1)(iii), are not corrected in accordance with this paragraph (b).

(5) *Failure to timely correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess contributions within 2½ months after the close of the plan year for which the excess contributions are made, the employer will be liable for a 10% excise tax on the amount of the excess contributions. See section 4979 and § 54.4979–1 of this chapter. Qualified nonelective contributions and qualified matching contributions properly taken into account under paragraph (a)(6) of this section for a plan year may enable a plan to avoid having excess contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess contributions are not corrected within 12 months after the close of the plan year for which they were made, the cash or deferred arrangement will fail to satisfy the requirements of section 401(k)(3) for the plan year for which the excess contributions are made and all

subsequent plan years during which the excess contributions remain in the trust.

(c) *Additional rules for prior year testing method*—(1) *Rules for change in testing method*—(i) *General rule.* A plan is permitted to change from the prior year testing method to the current year testing method for any plan year. A plan is permitted to change from the current year testing method to the prior year testing method only in situations described in paragraph (c)(1)(ii) of this section. For purposes of this paragraph (c)(1), a plan that uses the safe harbor method described in § 1.401(k)–3 or a SIMPLE 401(k) plan is treated as using the current year testing method for that plan year.

(ii) *Situations permitting a change to the prior year testing method.* The situations described in this paragraph (c)(1)(ii) are:

(A) The plan is not the result of the aggregation of two or more plans, and the current year testing method was used under the plan for each of the 5 plan years preceding the plan year of the change (or if lesser, the number of plan years the plan has been in existence, including years in which the plan was a portion of another plan).

(B) The plan is the result of the aggregation of two or more plans, and for each of the plans that are being aggregated (the aggregating plans), the current year testing method was used for each of the 5 plan years preceding the plan year of the change (or if lesser, the number of plan years since that aggregating plan has been in existence, including years in which the aggregating plan was a portion of another plan).

(C) A transaction described in section 410(b)(6)(C)(i) and § 1.410(b)–2(f) occurs and—

(*1*) As a result of the transaction, the employer maintains both a plan using the prior year testing method and a plan using the current year testing method; and

(*2*) The change from the current year testing method to the prior year testing method occurs within the transition period described in section 410(b)(6)(C)(ii).

(2) *Calculation of ADP under the prior year testing method for the first plan year*—(i) *Plans that are not successor plans.* If, for the first plan year of any plan (other than a successor plan), the plan uses the prior year testing method, the plan is permitted to use either that first plan year as the applicable year for determining the ADP for eligible NHCEs, or use 3% as the ADP for eligible NHCEs, for applying the ADP test for that first plan year. A plan (other than a successor plan) that uses the prior year testing method but has elected for its first plan year to use that year as the applicable year is not treated as changing its testing method in the second plan year and is not subject to the limitations on double counting on QNECs under paragraph (a)(6)(vi) of this section for the second plan year.

(ii) *First plan year defined.* For purposes of this paragraph (c)(2), the first plan year of any plan is the first year in which the plan provides for elective contributions. Thus, the rules of this paragraph (c)(2) do not apply to a plan (within the meaning of § 1.410(b)–7(b)) for a plan year if for such plan year the plan is aggregated under § 1.401(k)–1(b)(4) with any other plan that provides for elective contributions in the prior year.

(iii) *Successor plans.* A plan is a successor plan if 50% or more of the eligible employees for the first plan year were eligible employees under a qualified cash or deferred arrangement maintained by the employer in the prior year. If a plan that is a successor plan uses the prior year testing method for its first plan year, the ADP for the group of NHCEs for the applicable year must be determined under paragraph (c)(4) of this section.

(3) *Plans using different testing methods for the ADP and ACP test.* Except as otherwise provided in this paragraph (c)(3), a plan may use the current year testing method or prior year testing method for the ADP test for a plan year without regard to whether the current year testing method or prior year testing method is used for the ACP test for that year. For example, a plan may use the prior year testing method for the ADP test and the current year testing method for its ACP test for the plan year. However, plans that use different testing methods under this paragraph (c)(3) cannot use—

(i) The recharacterization method of paragraph (b)(3) of this section to correct excess contributions for a plan year;

(ii) The rules of § 1.401(m)–2(a)(6)(ii) to take elective contributions into account under the ACP test (rather than the ADP test); or

(iii) The rules of paragraph (a)(6)(v) of this section to take qualified matching contributions into account under the ADP test (rather than the ACP test).

(4) *Rules for plan coverage changes*—(i) *In general.* A plan that uses the prior year testing method and experiences a plan coverage change during a plan year satisfies the requirements of this section for that year only if the plan provides that the ADP for the NHCEs for the plan year is the weighted average of the ADPs for the prior year subgroups.

(ii) *Optional rule for minor plan coverage changes.* If a plan coverage change occurs and 90% or more of the total number of the NHCEs from all prior year subgroups are from a single prior year subgroup, then, in lieu of using the weighted averages described in paragraph (c)(4)(i) of this section, the plan may provide that the ADP for the group of eligible NHCEs for the prior year under the plan is the ADP of the NHCEs for the prior year of the plan under which that single prior year subgroup was eligible.

(iii) *Definitions.* The following definitions apply for purposes of this paragraph (c)(4):

(A) *Plan coverage change.* The term plan coverage change means a change in the group or groups of eligible employees under a plan on account of—

(*1*) The establishment or amendment of a plan;

(*2*) A plan merger or spinoff under section 414(l);

(*3*) A change in the way plans (within the meaning of § 1.410(b)–7(b)) are combined or separated for purposes of § 1.401(k)–1(b)(4) (*e.g.*, permissively aggregating plans not previously aggregated under § 1.410(b)–7(d), or ceasing to permissively aggregate plans under § 1.410(b)–7(d));

(*4*) A reclassification of a substantial group of employees that has the same effect as amending the plan (*e.g.*, a transfer of a substantial group of employees from one division to another division); or

(*5*) A combination of any of the situations described in this paragraph (c)(4)(iii)(A).

(B) *Prior year subgroup.* The term prior year subgroup means all NHCEs for the prior plan year who, in the prior year, were eligible employees under a specific plan maintained by the employer that included a qualified cash or deferred arrangement and who would have been eligible employees in the prior year under the plan being tested if the plan coverage change had first been effective as of the first day of the prior plan year instead of first being effective during the plan year. The determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether the NHCE terminated employment during the prior year.

(C) *Weighted average of the ADPs for the prior year subgroups.* The term weighted average of the ADPs for the prior year subgroups means the sum, for all prior year subgroups, of the adjusted ADPs for the plan year. The term adjusted ADP with respect to a prior year subgroup means the ADP for the prior plan year of the specific plan under which the members of the prior year subgroup were eligible employees on the first day of the prior plan year,

multiplied by a fraction, the numerator of which is the number of NHCEs in the prior year subgroup and denominator of which is the total number of NHCEs in all prior year subgroups.

(iv) *Examples.* The following examples illustrate the application of this paragraph (c)(4):

Example 1. (i) Employer B maintains two calendar year plans, Plan O and Plan P, each of which includes a cash or deferred arrangement. The plans were not permissively aggregated under § 1.410(b)–7(d) for the 2005 plan year. Both plans use the prior year testing method. Plan O had 300 eligible employees who were NHCEs for the 2005 plan year, and their ADP for that year was 6%. Sixty of the eligible employees who were NHCEs for the 2005 plan year under Plan O, terminated their employment during that year. Plan P had 100 eligible employees who were NHCEs for 2005, and the ADP for those NHCEs for that plan was 4%. Plan O and Plan P are permissively aggregated under § 1.410(b)–7(d) for the 2006 plan year.

(ii) The permissive aggregation of Plan O and Plan P for the 2006 plan year under § 1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan OP) for purposes of § 1.401(k)–1(b)(4). Therefore, the prior year ADP for the NHCEs under Plan OP for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups: the Plan O prior year subgroup and the Plan P prior year subgroup.

(iii) The Plan O prior year subgroup consists of the 300 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and who would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated for that plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P and would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated for that plan year.

(iv) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP for the Plan O prior year subgroup and the adjusted ADP for the Plan P prior year subgroup. The adjusted ADP for the Plan O prior year subgroup is 4.5%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year) x 300/400 (the number of NHCEs in the Plan O prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the Plan P prior year subgroup is 1%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year) x 100/400 (the number of NHCEs in the Plan P prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan OP for the 2006 plan year is 5.5% (the sum of adjusted ADPs for the prior year subgroups, 4.5% plus 1%).

(v) As provided in paragraph (c)(4)(iii)(B) of this section, the determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether that NHCE terminated employed during the prior year. Thus, the prior ADP for the NHCEs under Plan OP for the 2006 plan year is unaffected by the termination of the 60 NHCEs covered by Plan O during the 2005 plan year.

Example 2. (i) The facts are the same as Example 1, except that the 60 employees who terminated employment during the 2005 plan are instead spun-off to another plan.

(ii) The permissive aggregation of Plan O and Plan P for the 2006 plan year under § 1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan OP) for purposes of § 1.401(k)–1(b)(4) and the spin-off of the 60 employees is a plan coverage change. Therefore, the prior year ADP for the NHCEs under Plan OP for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups: the Plan O prior year subgroup and the Plan P prior year subgroup.

(iii) For purposes of determining the prior year subgroups, the employees who would have been eligible employees in the prior year under the plan being tested are determined as if both plan coverage changes had first been effective as of the first day of the prior plan year. The Plan O prior year subgroup consists of the 240 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and would have been eligible under Plan OP for the 2005 plan year if the spin-off had occurred at the beginning of the 2005 plan year and Plan O and Plan P had been permissively aggregated under § 1.410(b)–7(d) for that plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P and would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated under § 1.410(b)–7(d) for that plan year.

(iv) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP with respect to the prior year subgroup consisting of eligible NHCEs from Plan O and the adjusted ADP with respect to the prior year subgroup consisting of eligible NHCEs from Plan P. The adjusted ADP for the prior year subgroup consisting of eligible NHCEs under Plan O is 4.23%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year) x 240/340 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the prior year subgroup consisting of the eligible NHCEs from Plan P is 1.18%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year) x 100/340 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan OP for the 2006 plan year is 5.41% (the sum of adjusted ADPs for the prior year subgroups, 4.23% plus 1.18%).

Example 3. (i) The facts are the same as in Example 1, except that instead of Plan O and Plan P being permissively aggregated for the 2006 plan year, 200 of the employees eligible under Plan O were spun-off from Plan O and merged into Plan P.

(ii) The spin-off from Plan O and merger to Plan P for the 2006 plan year are plan coverage changes for Plan P. Therefore, the prior year ADP for the NHCEs under Plan P for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups under Plan P. There are 2 subgroups under Plan P for the 2006 plan year. The Plan O prior year subgroup consists of the 200 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and who would have been eligible under Plan P for the 2005 plan year if the spin-off and merger had occurred on the first day of the 2005 plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P for the 2005 plan year.

(iii) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP for the Plan O prior year subgroup and the adjusted ADP for the Plan P prior year subgroup. The adjusted ADP for the Plan O prior year subgroup is 4.0%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year) $\times$ 200/300 (the number of NHCEs in the Plan O prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the Plan P prior year subgroup is 1.33%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year) $\times$ 100/300 (the number of NHCEs in the Plan P prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan P for the 2006 plan year is 5.33% (the sum of adjusted ADPs for the 2 prior year subgroups, 4.0% plus 1.33%).

(iv) The spin-off from Plan O for the 2006 plan year is a plan coverage change for Plan O. Therefore, the prior year ADP for the NHCEs under Plan O for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups under Plan O. In this case, there is only one prior year subgroup under Plan O, the employees who were NHCEs of Employer B for the 2005 plan year and who were eligible for the 2005 plan year under Plan O. Because there is only one prior year subgroup under Plan O, the weighted average of the ADPs for the prior year subgroup under Plan O is equal to the NHCE ADP for the prior year (2005 plan year) under Plan O, or 6%.

Example 4. (i) Employer C maintains a calendar year plan, Plan Q, which includes a cash or deferred arrangement that uses the prior year testing method. Plan Q covers employees of Division A and Division B. In 2005, Plan Q had 500 eligible employees who were NHCEs, and the ADP for those NHCEs for 2005 was 2%. Effective January 1, 2006, Employer C amends the eligibility provisions under Plan Q to exclude employees of Division B effective January 1, 2006. In addition, effective on that same date, Employer C establishes a new calendar year plan, Plan R, which includes a cash or deferred arrangement that uses the prior year testing method. The only eligible employees under Plan R are the 100 employees of Division B who were eligible employees under Plan Q.

(ii) Plan R is a successor plan, within the meaning of paragraph (c)(2)(iii) of this section (because all of the employees were

eligible employees under Plan Q in the prior year). Therefore, Plan R cannot use the first plan year rule set forth in paragraph (c)(2)(i) of this section.

(iii) The amendment to the eligibility provisions of Plan Q and the establishment of Plan R are plan coverage changes within the meaning of paragraph (c)(4)(iii)(A) of this section for Plan Q and Plan R. Accordingly, each plan must determine the NHCE ADP for the 2006 plan year under the rules set forth in paragraph (c)(4) of this section.

(iv) The prior year ADP for NHCEs under Plan Q is the weighted average of the ADPs for the prior year subgroups. Plan Q has only one prior year subgroup (because the only NHCEs who would have been eligible employees under Plan Q for the 2005 plan year if the amendment to the Plan Q eligibility provisions had occurred as of the first day of that plan year were eligible employees under Plan Q). Therefore, for purposes of the 2006 plan year under Plan Q, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as if the plan amendment had not occurred.

(v) Similarly, Plan R has only one prior year subgroup (because the only NHCEs who would have been eligible employees under Plan R for the 2005 plan year if the plan were established as of the first day of that plan year were eligible employees under Plan Q). Therefore, for purposes of the 2006 testing year under Plan R, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as that of Plan Q.

Example 5. (i) The facts are the same as in *Example 4,* except that the provisions of Plan R extend eligibility to 50 hourly employees who previously were not eligible employees under any qualified cash or deferred arrangement maintained by Employer C.

(ii) Plan R is a successor plan (because 100 of Plan R's 150 eligible employees were eligible employees under another qualified cash or deferred arrangement maintained by Employer C in the prior year). Therefore, Plan R cannot use the first plan year rule set forth in paragraph (c)(2)(i) of this section.

(iii) The establishment of Plan R is a plan coverage change that affects Plan R. Because the 50 hourly employees were not eligible employees under any qualified cash or deferred arrangement of Employer C for the prior plan year, they do not comprise a prior year subgroup. Accordingly, Plan R still has only one prior year subgroup. Therefore, for purposes of the 2006 testing year under Plan R, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as that of Plan Q.

§ 1.401(k)–3 Safe harbor requirements.

(a) *ADP test safe harbor.* A cash or deferred arrangement satisfies the ADP safe harbor provision of section 401(k)(12) for a plan year if the arrangement satisfies the safe harbor contribution requirement of paragraph (b) or (c) of this section for the plan year, the notice requirement of paragraph (d) of this section, the plan year requirements of paragraph (e) of this section, and the additional rules of paragraphs (f), (g) and (h) of this section, as applicable. Pursuant to section 401(k)(12)(E)(ii), the safe harbor contribution requirement of paragraph (b) or (c) of this section must be satisfied without regard to section 401(l). The contributions made under paragraphs (b) and (c) of this section are referred to as safe harbor nonelective contributions and safe harbor matching contributions, respectively.

(b) *Safe harbor nonelective contribution requirement*—(1) *General rule.* The safe harbor nonelective contribution requirement of this paragraph is satisfied if, under the terms of the plan, the employer is required to make a qualified nonelective contribution on behalf of each eligible NHCE equal to at least 3% of the employee's safe harbor compensation.

(2) *Safe harbor compensation defined.* For purposes of this section, safe harbor compensation means compensation as defined in § 1.401(k)–6 (which incorporates the definition of compensation in § 1.414(s)–1); provided, however, that the rule in the last sentence of § 1.414(s)–1(d)(2)(iii) (which generally permits a definition of compensation to exclude all compensation in excess of a specified dollar amount) does not apply in determining the safe harbor compensation of NHCEs. Thus, for example, the plan may limit the period used to determine safe harbor compensation to the eligible employee's period of participation.

(c) *Safe harbor matching contribution requirement*—(1) *In general.* The safe harbor matching contribution requirement of this paragraph (c) is satisfied if, under the plan, qualified matching contributions are made on behalf of each eligible NHCE in an amount determined under the basic matching formula of section 401(k)(12)(B)(i)(I), as described in paragraph (c)(2) of this section, or under an enhanced matching formula of section 401(k)(12)(B)(i)(II), as described in paragraph (c)(3) of this section.

(2) *Basic matching formula.* Under the basic matching formula, each eligible NHCE receives qualified matching contributions in an amount equal to the sum of—

(i) 100% of the amount of the employee's elective contributions that do not exceed 3% of the employee's safe harbor compensation; and

(ii) 50% of the amount of the employee's elective contributions that exceed 3% of the employee's safe harbor compensation but that do not exceed 5% of the employee's safe harbor compensation.

(3) *Enhanced matching formula.* Under an enhanced matching formula, each eligible NHCE receives a matching contribution under a formula that, at any rate of elective contributions by the employee, provides an aggregate amount of qualified matching contributions at least equal to the aggregate amount of qualified matching contributions that would have been provided under the basic matching formula of paragraph (c)(2) of this section. In addition, under an enhanced matching formula, the ratio of matching contributions on behalf of an employee under the plan for a plan year to the employee's elective contributions may not increase as the amount of an employee's elective contributions increases.

(4) *Limitation on HCE matching contributions.* The safe harbor matching contribution requirement of this paragraph (c) is not satisfied if the ratio of matching contributions made on account of an HCE's elective contributions under the cash or deferred arrangement for a plan year to those elective contributions is greater than the ratio of matching contributions to elective contributions that would apply with respect to any eligible NHCE with elective contributions at the same percentage of safe harbor compensation.

(5) *Use of safe harbor match not precluded by certain plan provisions*—(i) *Safe harbor matching contributions on employee contributions.* The safe harbor matching contribution requirement of this paragraph (c) will not fail to be satisfied merely because safe harbor matching contributions are made on both elective contributions and employee contributions if safe harbor matching contributions are made with respect to the sum of elective contributions and employee contributions on the same terms as safe harbor matching contributions are made with respect to elective contributions. Alternatively, the safe harbor matching contribution requirement of this paragraph (c) will not fail to be satisfied merely because safe harbor matching contributions are made on both elective contributions and employee contributions if safe harbor matching contributions on elective contributions are not affected by the amount of employee contributions.

(ii) *Periodic matching contributions.* The safe harbor matching contribution requirement of this paragraph (c) will not fail to be satisfied merely because the plan provides that safe harbor matching contributions will be made separately with respect to each payroll period (or with respect to all payroll

periods ending with or within each month or quarter of a plan year) taken into account under the plan for the plan year, provided that safe harbor matching contributions with respect to any elective contributions made during a plan year quarter are contributed to the plan by the last day of the immediately following plan year quarter.

(6) *Permissible restrictions on elective contributions by NHCEs*—(i) *General rule.* The safe harbor matching contribution requirement of this paragraph (c) is not satisfied if elective contributions by NHCEs are restricted, unless the restrictions are permitted by this paragraph (c)(6).

(ii) *Restrictions on election periods.* A plan may limit the frequency and duration of periods in which eligible employees may make or change cash or deferred elections under a plan. However, an employee must have a reasonable opportunity (including a reasonable period after receipt of the notice described in paragraph (d) of this section) to make or change a cash or deferred election for the plan year. For purposes of this paragraph (c)(6)(ii), a 30-day period is deemed to be a reasonable period to make or change a cash or deferred election.

(iii) *Restrictions on amount of elective contributions.* A plan is permitted to limit the amount of elective contributions that may be made by an eligible employee under a plan, provided that each NHCE who is an eligible employee is permitted (unless the employee is restricted under paragraph (c)(6)(v) of this section) to make elective contributions in an amount that is at least sufficient to receive the maximum amount of matching contributions available under the plan for the plan year, and the employee is permitted to elect any lesser amount of elective contributions. However, a plan may require eligible employees to make cash or deferred elections in whole percentages of compensation or whole dollar amounts.

(iv) *Restrictions on types of compensation that may be deferred.* A plan may limit the types of compensation that may be deferred by an eligible employee under a plan, provided that each eligible NHCE is permitted to make elective contributions under a definition of compensation that would be a reasonable definition of compensation within the meaning of § 1.414(s)–1(d)(2). Thus, the definition of compensation from which elective contributions may be made is not required to satisfy the nondiscrimination requirement of § 1.414(s)–1(d)(3).

(v) *Restrictions due to limitations under the Internal Revenue Code.* A plan may limit the amount of elective contributions made by an eligible employee under a plan—

(A) Because of the limitations of section 402(g) or section 415; or

(B) Because, on account of a hardship distribution, an employee's ability to make elective contributions has been suspended for 6 months in accordance with § 1.401(k)–1(d)(3)(iv)(E).

(7) *Examples.* The following examples illustrate the safe harbor contribution requirement of this paragraph (c):

Example 1. (i) Beginning January 1, 2006, Employer A maintains Plan L covering employees (including HCEs and NHCEs) in Divisions D and E. Plan L contains a cash or deferred arrangement and provides qualified matching contributions equal to 100% of each eligible employee's elective contributions up to 3% of compensation and 50% of the next 2% of compensation. For purposes of the matching contribution formula, safe harbor compensation is defined as all compensation within the meaning of section 415(c)(3) (a definition that satisfies section 414(s)). Also, each employee is permitted to make elective contributions from all safe harbor compensation within the meaning of section 415(c)(3) and may change a cash or deferred election at any time. Plan L limits the amount of an employee's elective contributions for purposes of section 402(g) and section 415, and, in the case of a hardship distribution, suspends an employee's ability to make elective contributions for 6 months in accordance with § 1.401(k)–1(d)(3)(iv)(E). All contributions under Plan L are nonforfeitable and are subject to the withdrawal restrictions of section 401(k)(2)(B). Plan L provides for no other contributions and Employer A maintains no other plans. Plan L is maintained on a calendar-year basis and all contributions for a plan year are made within 12 months after the end of the plan year.

(ii) Based on these facts, matching contributions under Plan L are safe harbor matching contributions because they are qualified matching contributions equal to the basic matching formula. Accordingly, Plan L satisfies the safe harbor contribution requirement of this paragraph (c).

Example 2. (i) The facts are the same as in *Example 1*, except that instead of providing a basic matching contribution, Plan L provides a qualified matching contribution equal to 100% of each eligible employee's elective contributions up to 4% of safe harbor compensation.

(ii) Plan L's formula is an enhanced matching formula because each eligible NHCE receives safe harbor matching contributions at a rate that, at any rate of elective contributions, provides an aggregate amount of qualified matching contributions at least equal to the aggregate amount of qualified matching contributions that would have been received under the basic safe harbor matching formula, and the rate of matching contributions does not increase as the rate of an employee's elective contributions increases. Accordingly, Plan L satisfies the safe harbor contribution requirement of this paragraph (c).

Example 3. (i) The facts are the same as in *Example 1,* except that instead of permitting each employee to make elective contributions from all compensation within the meaning of section 415(c)(3), each employee's elective contributions under Plan L are limited to 15% of the employee's ''basic compensation.'' Basic compensation is defined under Plan L as compensation within the meaning of section 415(c)(3), but excluding overtime pay.

(ii) The definition of basic compensation under Plan L is a reasonable definition of compensation within the meaning of § 1.414(s)–1(d)(2).

(iii) Plan L will not fail to satisfy the safe harbor contribution requirement of this paragraph (c) merely because Plan L limits the amount of elective contributions and the types of compensation that may be deferred by eligible employees, provided that each eligible NHCE may make elective contributions equal to at least 4% of the employee's safe harbor compensation.

Example 4. (i) The facts are the same as in *Example 1,* except that Plan L provides that only employees employed on the last day of the plan year will receive a safe harbor matching contribution.

(ii) Even if the plan that provides for employee contributions and matching contributions satisfies the minimum coverage requirements of section 410(b)(1) taking into account this last-day requirement, Plan L would not satisfy the safe harbor contribution requirement of this paragraph (c) because safe harbor matching contributions are not made on behalf of all eligible NHCEs who make elective contributions.

(iii) The result would be the same if, instead of providing safe harbor matching contributions under an enhanced formula, Plan L provides for a 3% safe harbor nonelective contribution that is restricted to eligible employees under the cash or deferred arrangement who are employed on the last day of the plan year.

Example 5. (i) The facts are the same as in *Example 1*, except that instead of providing qualified matching contributions under the basic matching formula to employees in both Divisions D and E, employees in Division E are provided qualified matching contributions under the basic matching formula, while safe harbor matching contributions continue to be provided to employees in Division D under the enhanced matching formula described in *Example 2.*

(ii) Even if Plan L satisfies § 1.401(a)(4)–4 with respect to each rate of matching contributions available to employees under the plan, the plan would fail to satisfy the safe harbor contribution requirement of this paragraph (c) because the rate of matching contributions with respect to HCEs in Division D at a rate of elective contributions between 3% and 5% would be greater than that with respect to NHCEs in Division E at the same rate of elective contributions. For example, an HCE in Division D who would have a 4% rate of elective contributions would have a rate of matching contributions of 100% while an NHCE in Division E who

would have the same rate of elective contributions would have a lower rate of matching contributions.

(d) *Notice requirement*—(1) *General rule.* The notice requirement of this paragraph (d) is satisfied for a plan year if each eligible employee is given written notice of the employee's rights and obligations under the plan and the notice satisfies the content requirement of paragraph (d)(2) of this section and the timing requirement of paragraph (d)(3) of this section.

(2) *Content requirement*—(i) *General rule.* The content requirement of this paragraph (d)(2) is satisfied if the notice is—

(A) Sufficiently accurate and comprehensive to inform the employee of the employee's rights and obligations under the plan; and

(B) Written in a manner calculated to be understood by the average employee eligible to participate in the plan.

(ii) *Minimum content requirement.* Subject to the requirements of paragraph (d)(2)(iii) of this section, a notice is not considered sufficiently accurate and comprehensive unless the notice accurately describes—

(A) The safe harbor matching contribution or safe harbor nonelective contribution formula used under the plan (including a description of the levels of safe harbor matching contributions, if any, available under the plan);

(B) Any other contributions under the plan or matching contributions to another plan on account of elective contributions or employee contributions under the plan (including the potential for discretionary matching contributions) and the conditions under which such contributions are made;

(C) The plan to which safe harbor contributions will be made (if different than the plan containing the cash or deferred arrangement);

(D) The type and amount of compensation that may be deferred under the plan;

(E) How to make cash or deferred elections, including any administrative requirements that apply to such elections;

(F) The periods available under the plan for making cash or deferred elections;

(G) Withdrawal and vesting provisions applicable to contributions under the plan; and

(H) Information that makes it easy to obtain additional information about the plan (including an additional copy of the summary plan description) such as telephone numbers, addresses and, if applicable, electronic addresses, of individuals or offices from whom employees can obtain such plan information.

(iii) *References to SPD.* A plan will not fail to satisfy the content requirements of this paragraph (d)(2) merely because, in the case of information described in paragraph (d)(2)(ii)(B) of this section (relating to any other contributions under the plan), paragraph (d)(2)(ii)(C) of this section (relating to the plan to which safe harbor contributions will be made) or paragraph (d)(2)(ii)(D) of this section (relating to the type and amount of compensation that may be deferred under the plan), the notice cross-references the relevant portions of a summary plan description that provides the same information that would be provided in accordance with such paragraphs and that has been provided (or is concurrently provided) to employees.

(3) *Timing requirement*—(i) *General rule.* The timing requirement of this paragraph (d)(3) is satisfied if the notice is provided within a reasonable period before the beginning of the plan year (or, in the year an employee becomes eligible, within a reasonable period before the employee becomes eligible). The determination of whether a notice satisfies the timing requirement of this paragraph (d)(3) is based on all of the relevant facts and circumstances.

(ii) *Deemed satisfaction of timing requirement.* The timing requirement of this paragraph (d)(3) is deemed to be satisfied if at least 30 days (and no more than 90 days) before the beginning of each plan year, the notice is given to each eligible employee for the plan year. In the case of an employee who does not receive the notice within the period described in the previous sentence because the employee becomes eligible after the 90th day before the beginning of the plan year, the timing requirement is deemed to be satisfied if the notice is provided no more than 90 days before the employee becomes eligible (and no later than the date the employee becomes eligible). Thus, for example, the preceding sentence would apply in the case of any employee eligible for the first plan year under a newly established plan that provides for elective contributions, or would apply in the case of the first plan year in which an employee becomes eligible under an existing plan that provides for elective contributions.

(e) *Plan year requirement*—(1) *General rule.* Except as provided in this paragraph (e) or in paragraph (f) of this section, a plan will fail to satisfy the requirements of section 401(k)(12) and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. Moreover, if, as described under paragraph (g)(4) of this section, safe harbor matching or nonelective contributions will be made to another plan for a plan year, provisions specifying that the safe harbor contributions will be made in the other plan and providing that the contributions will be QNECs or QMACs must also be adopted before the first day of that plan year.

(2) *Initial plan year.* A newly established plan (other than a successor plan within the meaning of § 1.401(k)–2(c)(2)(iii)) will not be treated as violating the requirements of this paragraph (e) merely because the plan year is less than 12 months, provided that the plan year is at least 3 months long (or, in the case of a newly established employer that establishes the plan as soon as administratively feasible after the employer comes into existence, a shorter period). Similarly, a cash or deferred arrangement will not fail to satisfy the requirement of this paragraph (e) if it is added to an existing profit sharing, stock bonus, or pre-ERISA money purchase pension plan for the first time during that year provided that—

(i) The plan is not a successor plan; and

(ii) The cash or deferred arrangement is made effective no later than 3 months prior to the end of the plan year.

(3) *Change of plan year.* A plan that has a short plan year as a result of changing its plan year will not fail to satisfy the requirements of paragraph (e)(1) of this section merely because the plan year has less than 12 months, provided that—

(i) The plan satisfied the requirements of this section for the immediately preceding plan year; and

(ii) The plan satisfies the requirements of this section for the immediately following plan year.

(4) *Final plan year.* A plan that terminates during a plan year will not fail to satisfy the requirements of paragraph (e)(1) of this section merely because the final plan year is less than 12 months, provided that—

(i) The plan would satisfy the requirements of paragraph (g) of this section, treating the termination of the plan as a reduction or suspension of safe harbor matching contributions, other than the requirement that employees have a reasonable opportunity to change their cash or deferred elections and, if applicable, employee contribution elections; or

(ii) The plan termination is in connection with a transaction described

in section 410(b)(6)(C) or the employer incurs a substantial business hardship comparable to a substantial business hardship described in section 412(d).

(f) *Plan amendments adopting safe harbor nonelective contributions*—(1) *General rule.* Notwithstanding paragraph (e)(1) of this section, a plan that provides for the use of the current year testing method may be amended after the first day of the plan year and no later than 30 days before the last day of the plan year to adopt the safe harbor method of this section using nonelective contributions under paragraph (b) of this section, but only if the plan provides the contingent and follow-up notices described in this section. A plan amendment made pursuant to this paragraph (f)(1) for a plan year may provide for the use of the safe harbor method described in this section solely for that plan year and a plan sponsor is not limited in the number of years for which it is permitted to adopt an amendment providing for the safe harbor method of this section using nonelective contributions under paragraph (b) of this section.

(2) *Contingent notice provided.* A plan satisfies the requirement to provide the contingent notice under this paragraph (f)(2) if it provides a notice that would satisfy the requirements of paragraph (d) of this section, except that, in lieu of setting forth the safe harbor contributions used under the plan as set forth in paragraph (d)(2)(ii)(A) of this section, the notice specifies that the plan may be amended during the plan year to include the safe harbor nonelective contribution and that, if the plan is amended, a follow-up notice will be provided.

(3) *Follow-up notice requirement.* A plan satisfies the requirement to provide a follow-up notice under this paragraph (f)(3) if, no later than 30 days before the last day of the plan year, each eligible employee is given a notice that states that the safe harbor nonelective contributions will be made for the plan year. This notice is permitted to be combined with a contingent notice provided under paragraph (f)(2) of this section for the next plan year.

(g) *Permissible reduction or suspension of safe harbor matching contributions*—(1) *General rule.* A plan that provides for safe harbor matching contributions will not fail to satisfy the requirements of section 401(k)(3) for a plan year merely because the plan is amended during a plan year to reduce or suspend safe harbor matching contributions on future elective contributions (and, if applicable, employee contributions) provided that—

(i) All eligible employees are provided the supplemental notice in accordance with paragraph (g)(2) of this section;

(ii) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of 30 days after eligible employees are provided the notice described in paragraph (g)(2) of this section and the date the amendment is adopted;

(iii) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(iv) The plan is amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in § 1.401(k)–2(a)(2)(ii); and

(v) The plan satisfies the requirements of this section (other than this paragraph (g)) with respect to amounts deferred through the effective date of the amendment.

(2) *Notice of suspension requirement.* The notice of suspension requirement of this paragraph (g)(2) is satisfied if each eligible employee is given a written notice that explains—

(i) The consequences of the amendment which reduces or suspends matching contributions on future elective contributions and, if applicable, employee contributions;

(ii) The procedures for changing their cash or deferred election and, if applicable, their employee contribution elections; and

(iii) The effective date of the amendment.

(h) *Additional rules*—(1) *Contributions taken into account.* A contribution is taken into account for purposes of this section for a plan year if and only if the contribution would be taken into account for such plan year under the rules of § 1.401(k)–2(a) or 1.401(m)–2(a). Thus, for example, a safe harbor matching contribution must be made within 12 months of the end of the plan year. Similarly, an elective contribution that would be taken into account for a plan year under § 1.401(k)–2(a)(4)(i)(B)(2) must be taken into account for such plan year for purposes of this section, even if the compensation would have been received after the close of the plan year.

(2) *Use of safe harbor nonelective contributions to satisfy other nondiscrimination tests.* A safe harbor nonelective contribution used to satisfy the nonelective contribution requirement under paragraph (b) of this section may also be taken into account for purposes of determining whether a plan satisfies section 401(a)(4). Thus, these contributions are not subject to the limitations on qualified nonelective contributions under § 1.401(k)–2(a)(6)(ii), but are subject to the rules generally applicable to nonelective contributions under section 401(a)(4). See § 1.401(a)(4)–1(b)(2)(ii). However, pursuant to section 401(k)(12)(E)(ii), to the extent they are needed to satisfy the safe harbor contribution requirement of paragraph (b) of this section, safe harbor nonelective contributions may not be taken into account under any plan for purposes of section 401(l) (including the imputation of permitted disparity under § 1.401(a)(4)–7).

(3) *Early participation rules.* Section 401(k)(3)(F) and § 1.401(k)–2(a)(1)(iii)(A), which provide an alternative nondiscrimination rule for certain plans that provide for early participation, do not apply for purposes of section 401(k)(12) and this section. Thus, a plan is not treated as satisfying this section with respect to the eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A) unless the plan satisfies the requirements of this section with respect to such eligible employees.

(4) *Satisfying safe harbor contribution requirement under another defined contribution plan.* Safe harbor matching or nonelective contributions may be made to the plan that contains the cash or deferred arrangement or to another defined contribution plan that satisfies section 401(a) or 403(a). If safe harbor contributions are made to another defined contribution plan, the safe harbor plan must specify the plan to which the safe harbors are made and contribution requirement of paragraph (b) or (c) of this section must be satisfied in the other defined contribution plan in the same manner as if the contributions were made to the plan that contains the cash or deferred arrangement. Consequently, the plan to which the contributions are made must have the same plan year as the plan containing the cash and deferred arrangement and each employee eligible under the plan containing the cash or deferred arrangement must be eligible under the same conditions under the other defined contribution plan. The plan to which the safe harbor contributions are made need not be a plan that can be aggregated with the plan that contains the cash or deferred arrangement.

(5) *Contributions used only once.* Safe harbor matching or nonelective contributions cannot be used to satisfy

the requirements of this section with respect to more than one plan.

§ 1.401(k)–4 SIMPLE 401(k) plan requirements.

(a) *General rule.* A cash or deferred arrangement satisfies the SIMPLE 401(k) plan provision of section 401(k)(11) for a plan year if the arrangement satisfies the requirements of paragraphs (b) through (i) of this section for that year. A plan that contains a cash or deferred arrangement that satisfies this section is referred to as a SIMPLE 401(k) plan. Pursuant to section 401(k)(11), a SIMPLE 401(k) plan is treated as satisfying the ADP test of section 401(k)(3)(A)(ii) for that year.

(b) *Eligible employer*—(1) *General rule.* A SIMPLE 401(k) plan must be established by an eligible employer. Eligible employer for purposes of this section means, with respect to any plan year, an employer that had no more than 100 employees who received at least $5,000 of SIMPLE compensation, as defined in paragraph (e)(5) of this section, from the employer for the prior calendar year.

(2) *Special rule.* An eligible employer that establishes a SIMPLE 401(k) plan for a plan year and that fails to be an eligible employer for any subsequent plan year, is treated as an eligible employer for the 2 plan years following the last plan year the employer was an eligible employer. If the failure is due to any acquisition, disposition, or similar transaction involving an eligible employer, the preceding sentence applies only if the provisions of section 410(b)(6)(C)(i) are satisfied.

(c) *Exclusive plan*—(1) *General rule.* The SIMPLE 401(k) plan must be the exclusive plan for each SIMPLE 401(k) plan participant for the plan year. This requirement is satisfied if there are no contributions made, or benefits accrued, for services during the plan year on behalf of any SIMPLE 401(k) plan participant under any other qualified plan maintained by the employer. Other qualified plan for purposes of this section means any plan, contract, pension, or trust described in section 219(g)(5)(A) or (B).

(2) *Special rule.* A SIMPLE 401(k) plan will not be treated as failing the requirements of this paragraph (c) merely because any SIMPLE 401(k) plan participant receives an allocation of forfeitures under another plan of the employer.

(d) *Election and notice*—(1) *General rule.* An eligible employer establishing or maintaining a SIMPLE 401(k) plan must satisfy the election and notice requirements in paragraphs (d)(2) and (d)(3) of this section.

(2) *Employee elections*—(i) *Initial plan year of participation.* For the plan year in which an employee first becomes eligible under the SIMPLE 401(k) plan, the employee must be permitted to make a cash or deferred election under the plan during a 60-day period that includes either the day the employee becomes eligible or the day before.

(ii) *Subsequent plan years.* For each subsequent plan year, each eligible employee must be permitted to make or modify his cash or deferred election during the 60-day period immediately preceding such plan year.

(iii) *Election to terminate.* An eligible employee must be permitted to terminate his cash or deferred election at any time. If an employee does terminate his cash or deferred election, the plan is permitted to provide that such employee cannot have elective contributions made under the plan for the remainder of the plan year.

(3) *Employee notices.* The employer must notify each eligible employee within a reasonable time prior to each 60-day election period, or on the day the election period starts, that he or she can make a cash or deferred election, or modify a prior election, if applicable, during that period. The notice must state whether the eligible employer will make the matching contributions described in paragraph (e)(3) of this section or the nonelective contributions described in paragraph (e)(4) of this section.

(e) *Contributions*—(1) *General rule.* A SIMPLE 401(k) plan satisfies the contribution requirements of this paragraph (e) for a plan year only if no contributions may be made to the SIMPLE 401(k) plan during such year, other than contributions described in this paragraph (e) and rollover contributions described in § 1.402(c)–2, Q&A–1(a).

(2) *Elective contributions.* Subject to the limitations on annual additions under section 415, each eligible employee must be permitted to make an election to have up to $10,000 of elective contributions made on the employee's behalf under the SIMPLE 401(k) plan for a plan year. The $10,000 limit is increased beginning in 2006 in the same manner as the $160,000 amount is adjusted under section 415(d), except that pursuant to section 408(p)(2)(E)(ii) the base period shall be the calendar quarter beginning July 1, 2004 and any increase which is not a multiple of $500 is rounded to the next lower multiple of $500.

(3) *Matching contributions.* Each plan year, the eligible employer must contribute a matching contribution to the account of each eligible employee on whose behalf elective contributions were made for the plan year. The amount of the matching contribution must equal the lesser of the eligible employee's elective contributions for the plan year or 3% of the eligible employee's SIMPLE compensation for the entire plan year.

(4) *Nonelective contributions.* For any plan year, in lieu of contributing matching contributions described in paragraph (e)(3) of this section, an eligible employer may, in accordance with plan terms, contribute a nonelective contribution to the account of each eligible employee in an amount equal to 2% of the eligible employee's SIMPLE compensation for the entire plan year. The eligible employer may limit the nonelective contributions to those eligible employees who received at least $5,000 of SIMPLE compensation from the employer for the entire plan year.

(5) *SIMPLE compensation.* Except as otherwise provided, the term SIMPLE compensation for purposes of this section means the sum of wages, tips, and other compensation from the eligible employer subject to federal income tax withholding (as described in section 6051(a)(3)) and the employee's elective contributions made under any other plan, and if applicable, elective deferrals under a section 408(p) SIMPLE IRA plan, a section 408(k)(6) SARSEP, or a plan or contract that satisfies the requirements of section 403(b), and compensation deferred under a section 457 plan, required to be reported by the employer on Form W–2 (as described in section 6051(a)(8)). For self-employed individuals, SIMPLE compensation means net earnings from self-employment determined under section 1402(a) prior to subtracting any contributions made under the SIMPLE 401(k) plan on behalf of the individual.

(f) *Vesting.* All benefits attributable to contributions described in paragraph (e) of this section must be nonforfeitable at all times.

(g) *Plan year.* The plan year of a SIMPLE 401(k) plan must be the whole calendar year. Thus, in general, a SIMPLE 401(k) plan can be established only on January 1 and can be terminated only on December 31. However, in the case of an employer that did not previously maintain a SIMPLE 401(k) plan, the establishment date can be as late as October 1 (or later in the case of an employer that comes into existence after October 1 and establishes the SIMPLE 401(k) plan as soon as administratively feasible after the employer comes into existence).

(h) *Other rules.* A SIMPLE 401(k) plan is not treated as a top-heavy plan under section 416. See section 416(g)(4)(G).

§ 1.401(k)–5 Special rules for mergers, acquisitions and similar events. [Reserved].

§ 1.401(k)–6 Definitions.

Unless otherwise provided, the definitions of this section govern for purposes of section 401(k) and the regulations thereunder.

Actual contribution percentage (ACP) test. Actual contribution percentage test or *ACP test* means the test described in § 1.401(m)–2(a)(1).

Actual deferral percentage (ADP). Actual deferral percentage or *ADP* means the ADP of the group of eligible employees as defined in § 1.401(k)–2(a)(2).

Actual deferral percentage (ADP) test. Actual deferral percentage test or *ADP test* means the test described in § 1.401(k)–2(a)(1).

Actual deferral ratio (ADR). Actual deferral ratio or *ADR* means the ADR of an eligible employee as defined in § 1.401(k)–2(a)(3).

Cash or deferred arrangement. Cash or deferred arrangement is defined in § 1.401(k)–1(a)(2).

Cash or deferred election. Cash or deferred election is defined in § 1.401(k)–1(a)(3).

Compensation. Compensation means compensation as defined in section 414(s) and § 1.414(s)–1. The period used to determine an employee's compensation for a plan year must be either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year. A plan may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year. In the case of an HCE whose ADR is determined under § 1.401(k)–2(a)(3)(ii), period of participation includes periods under another plan for which elective contributions are aggregated under § 1.401(k)–2(a)(3)(ii). See also section 401(a)(17) and § 1.401(a)(17)–1(c)(1).

Current year testing method. Current year testing method means the testing method described in § 1.401(k)–2(a)(2)(ii) or § 1.401(m)–2(a)(2)(ii) under which the applicable year is the current plan year.

Elective contributions. Elective contributions means employer contributions made to a plan pursuant to a cash or deferred election under a cash or deferred arrangement (whether or not the arrangement is a qualified cash or deferred arrangement under § 1.401(k)–1(a)(4)).

Eligible employee—(1) *General rule. Eligible employee* means an employee who is directly or indirectly eligible to make a cash or deferred election under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (*e.g.*, formal application for participation or consent to payroll withholding) in order to be eligible to make a cash or deferred election for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs the acts.

(2) *Conditions on eligibility.* An employee who is unable to make a cash or deferred election because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (*e.g.*, satisfy a minimum period of service requirement) in order to be eligible to make a cash or deferred election for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. See § 1.401(k)–1(e)(5), however, for certain limits on the use of minimum service requirements. An employee who would be eligible to make elective contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is treated as an eligible employee for purposes of section 401(k)(3) for a plan year even though the employee may not make a cash or deferred election by reason of the suspension. Finally, an employee does not fail to be treated as an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1).

(3) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, upon commencing employment with the employer or upon the employee's first becoming eligible to make a cash or deferred election under any arrangement of the employer, is given the one-time opportunity to elect, and the employee does in fact elect, not to be eligible to make a cash or deferred election under the plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. This rule applies in addition to the rules in § 1.401(k)–1(a)(3)(v) relating to the definition of a cash or deferred election. In no event is an election made after December 23, 1994, treated as a one-time irrevocable election under this paragraph if the election is made by an employee who previously became eligible under another plan (whether or not terminated) of the employer.

Eligible HCE. Eligible HCE means an eligible employee who is an HCE.

Eligible NHCE. Eligible NHCE means an eligible employee who is not an HCE.

Employee. Employee means an employee within the meaning of § 1.410(b)–9.

Employee stock ownership plan (ESOP). Employee stock ownership plan or ESOP means the portion of a plan that is an ESOP within the meaning of § 1.410(b)–7(c)(2).

Employer. Employer means an employer within the meaning of § 1.410(b)–9.

Excess contributions. Excess contributions means, with respect to a plan year, the amount of total excess contributions apportioned to an HCE under § 1.401(k)–2(b)(2)(iii).

Excess deferrals. Excess deferrals means excess deferrals as defined in § 1.402(g)–1(e)(3).

Highly compensated employee (HCE). Highly compensated employee or *HCE* has the meaning provided in section 414(q).

Matching contributions. Matching contributions means matching contributions as defined in § 1.401(m)–1(a)(2).

Nonelective contributions. Nonelective contributions means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

Non-employee stock ownership plan (non-ESOP). Non-employee stock ownership plan or *non-ESOP* means the portion of a plan that is not an ESOP within the meaning of § 1.410(b)–7(c)(2).

Non-highly compensated employee (NHCE). Non-highly compensated employee or *NHCE* means an employee who is not an HCE.

Plan. Plan is defined in § 1.401(k)–1(b)(4).

Pre-ERISA money purchase pension plan. (1) *Pre-ERISA money purchase pension plan* is a pension plan—

(i) That is a defined contribution plan (as defined in section 414(i));

(ii) That was in existence on June 27, 1974, and as in effect on that date, included a salary reduction agreement; and

(iii) Under which neither the employee contributions nor the employer contributions, including

elective contributions, may exceed the levels (as a percentage of compensation) provided for by the contribution formula in effect on June 27, 1974.

(2) A plan was in existence on June 27, 1974, if it was a written plan adopted on or before that date, even if no funds had yet been paid to the trust associated with the plan.

Prior year testing method. Prior year testing method means the testing method under which the applicable year is the prior plan year, as described in § 1.401(k)–2(a)(2)(ii) or § 1.401(m)–2(a)(2)(ii).

Qualified matching contributions (QMACs). Qualified matching contributions or *QMACs* means matching contributions that, except as provided otherwise in § 1.401(k)–1(c) and (d), satisfy the requirements of § 1.401(k)–1(c) and (d) as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ACP test under § 1.401(m)–2(a)(6). Thus, the matching contributions must satisfy the vesting requirements of § 1.401(k)–1(c) and be subject to the distribution requirements of § 1.401(k)–1(d) when they are contributed to the plan. *See also* § 1.401(k)–2(b)(4)(iii) for a rule providing that a matching contribution does not fail to qualify as a QMAC solely because it is forfeitable under section 411(a)(3)(G) because it is a matching contribution with respect to an excess deferral, excess contribution, or excess aggregate contribution.

Qualified nonelective contributions (QNECs). Qualified nonelective contributions or *QNECs* means employer contributions, other than elective contributions or matching contributions, that, except as provided otherwise in § 1.401(k)–1(c) and (d), satisfy the requirements of § 1.401(k)–1(c) and (d) as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ACP test under § 1.401(m)–2(a)(6). Thus, the nonelective contributions must satisfy the vesting requirements of § 1.401(k)–1(c) and be subject to the distribution requirements of § 1.401(k)–1(d) when they are contributed to the plan.

Rural cooperative plans. Rural cooperative plan means a plan described in section 401(k)(7).

Par. 3. Sections 1.401(m)–0 through 1.401(m)–2 are revised and §§1.401(m)–3 through 1.401(m)–5 are added to read as follows:

§ 1.401(m)–0 Table of contents.

This section contains first a list of section headings and then a list of the paragraphs in each section in §§ 1.401(m)–1 through 1.401(m)–5.

List of Sections

List of Paragraphs

§ 1.401(m)–1 Employee contributions and matching contributions.

(a) *General nondiscrimination rules*—(1) *Nondiscriminatory amount of contributions*—(i) *Exclusive means of amounts testing.* A defined contribution plan does not satisfy section 401(a) for a plan year unless the amount of employee contributions and matching contributions to the plan for the plan year satisfies section 401(a)(4). The amount of employee contributions and matching contributions under a plan satisfies the requirements of section 401(a)(4) with respect to amounts if and only if the amount of employee contributions and matching contributions satisfies the nondiscrimination test of section 401(m) under paragraph (b) of this section and the plan satisfies the additional requirements of paragraph (c) of this section. *See* § 1.401(a)(4)–1(b)(2)(ii)(B).

(ii) *Testing benefits, rights and features.* A plan that provides for employee contributions or matching contributions must satisfy the requirements of section 401(a)(4) relating to benefits, rights and features in addition to the requirement regarding amounts described in paragraph (a)(1)(i) of this section. For example, the right to make each level of employee contributions and the right to each level of matching contributions under the plan are benefits, rights or features subject to the requirements of section 401(a)(4). See § 1.401(a)(4)–4(e)(3)(i) and (iii)(F) through (G).

(2) *Matching contributions*—(i) *In general.* For purposes of section 401(m), this section and §§ 1.401(m)–2 through 1.401(m)–5, matching contributions are—

(A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer;

(B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective deferral; and

(C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective deferrals.

(ii) *Employer contributions made on account of an employee contribution or elective deferral.* Whether an employer contribution is made on account of an employee contribution or an elective deferral is determined on the basis of all the relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. An employer contribution made to a defined contribution plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is intended to be a qualified plan or a plan described in § 1.402(g)–1(b) is not a matching contribution.

(iii) *Employer contributions not on account of an employee contribution or elective deferral.* An employer contribution is not a matching contribution made on account of an elective deferral if it is contributed before the cash or deferred election is made or before the employee's performance of services with respect to which the elective deferral is made (or when the cash that is subject to the cash or deferred election would be currently available, if earlier). In addition, an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution.

(3) *Employee contributions*—(i) *In general.* For purposes of section 401(m), this section and §§ 1.401(m)–2 through 1.401(m)–5, employee contributions are contributions to a plan that are designated or treated at the time of contribution as after-tax employee contributions (*e.g.*, by treating the contributions as taxable income subject to applicable withholding requirements) and are allocated to an individual account for each eligible employee to which attributable earnings and losses are allocated. *See* § 1.401(k)–1(a)(2)(ii). The term *employee contributions* includes—

(A) Employee contributions to the defined contribution portion of a plan described in section 414(k);

(B) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan;

(C) Amounts attributable to excess contributions within the meaning of section 401(k)(8)(B) that are recharacterized as employee contributions under § 1.401(k)–2(b)(3); and

(D) Employee contributions to a plan or contract that satisfies the requirements of section 403(b).

(ii) *Certain contributions not treated as employee contributions.* The term employee contributions does not include repayment of loans, repayment of distributions described in section 411(a)(7)(C), or employee contributions that are transferred to the plan from another plan.

(iii) *Qualified cost-of-living arrangements.* Employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B) are treated as employee contributions to a defined contribution plan, without regard to the requirement that the employee contributions be allocated to an individual account to which attributable earnings and losses are allocated.

(b) *Nondiscrimination requirements for amount of contributions*—(1) *Matching contributions and employee contributions.* The matching contributions and employee contributions under a plan satisfy this paragraph (b) for a plan year only if the plan satisfies—

(i) The ACP test of section 401(m)(2) described in § 1.401(m)–2;

(ii) The ACP safe harbor provisions of section 401(m)(11) described in § 1.401(m)–3; or

(iii) The SIMPLE 401(k) provisions of sections 401(k)(11) and 401(m)(10) described in § 1.401(k)–4.

(2) *Automatic satisfaction by certain plans.* Notwithstanding paragraph (b)(1) of this section, the requirements of this section are treated as satisfied with respect to employee contributions and matching contributions under a collectively bargained plan (or the portion of a plan) that automatically satisfies section 410(b). *See* §§ 1.401(a)(4)–1(c)(5) and 1.410(b)–2(b)(7). Additionally, the requirements of sections 401(a)(4) and 410(b) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof). See sections 401(a)(5)(G), 403(b)(12)(C) and 410(c)(1)(A).

(3) *Anti-abuse provisions.* The regulations in this paragraph (b) are designed to provide simple, practical rules that accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ACP for NHCEs (which is used as a benchmark for testing the ACP for HCEs) or to otherwise manipulate the nondiscrimination testing requirements of this paragraph (b). Further, this paragraph (b) is part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of this paragraph (b) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ACP so as to increase significantly the permitted ACP for HCEs, or otherwise manipulate the nondiscrimination rules of this paragraph, if a principal purpose of the changes was to achieve such a result.

(4) *Aggregation and restructuring*—(i) *In general.* This paragraph (b)(4) contains the exclusive rules for aggregating and disaggregating plans that provide for employee contributions and matching contributions for purposes of this section and §§ 1.401(m)–2 through 1.401(m)–5.

(ii) *Aggregation of employee contributions and matching contributions within a plan.* Except as otherwise specifically provided in this paragraph (b)(4) and § 1.401(m)–3(f)(1), a plan must be subject to a single test under paragraph (b)(1) of this section with respect to all employee contributions and matching contributions and all eligible employees under the plan. Thus, for example, if two groups of employees are eligible for matching contributions under a plan, all employee contributions and matching contributions under the plan must be subject to a single test, even if they have significantly different features, such as different rates of match.

(iii) *Aggregation of plans*—(A) *In general.* The term *plan* means a plan within the meaning of § 1.410(b)–7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)–7(c), and the permissive aggregation rules of § 1.410(b)–7(d), as modified by paragraph (b)(4)(v) of this section. Thus, for example, two plans (within the meaning of § 1.410(b)–7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)–7(d) are treated as a single plan for purposes of sections 401(k) and 401(m).

(B) *Arrangements with inconsistent ACP testing methods.* Pursuant to paragraph (b)(4)(ii) of this section, a single testing method must apply with respect to all employee contributions and matching contributions and all eligible employees under a plan. Thus, in applying the permissive aggregation rules of § 1.410(b)–7(d), an employer may not aggregate plans (within the meaning of § 1.410(b)–7(b)) that apply inconsistent testing methods. For example, a plan (within the meaning of § 1.410(b)–7) that applies the current year testing method may not be aggregated with another plan that applies the prior year testing method. Similarly, an employer may not aggregate a plan (within the meaning of § 1.410(b)–7) that is using the ACP safe harbor provisions of section 401(m)(11) and another plan that is using the ACP test of section 401(m)(2).

(iv) *Disaggregation of plans and separate testing*—(A) *In general.* If employee contributions or matching contributions are included in a plan (within the meaning of § 1.410(b)–7(b)) that is mandatorily disaggregated under the rules of section 410(b) (as modified by this paragraph (b)(4)), the matching contributions and employee contributions under that plan must be disaggregated in a consistent manner. For example, in the case of an employer that is treated as operating qualified separate lines of business under section 414(r), if the eligible employees under a plan which provides for employee contributions or matching contributions are in more than one qualified separate line of business, only those employees within each qualified separate line of business may be taken into account in determining whether each disaggregated portion of the plan complies with the requirements of section 401(m), unless the employer is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan. Similarly, if a plan that provides for employee contributions or matching contributions under which employees are permitted to participate before they have completed the minimum age and service requirements of section 410(a)(1) applies section 410(b)(4)(B) for determining whether the plan complies with section 410(b)(1), then the plan must be treated as two separate plans, one comprising all eligible employees who have met the minimum age and service requirements of section 410(a)(1) and one comprising all eligible employees who have not met the minimum age and service requirements of section 410(a)(1), unless the plan is using the rule in § 1.401(m)–2(a)(1)(iii)(A).

(B) *Restructuring prohibited.* Restructuring under § 1.401(a)(4)–9(c) may not be used to demonstrate compliance with the requirements of

section 401(m). *See* § 1.401(a)(4)–9(c)(3)(ii).

(v) *Certain disaggregation rules not applicable.* The mandatory disaggregation rules relating to section 401(k) plans and section 401(m) plans set forth in § 1.410(b)–7(c)(1) and to ESOP and non-ESOP portions of a plan set forth in § 1.410(b)–7(c)(2) shall not apply for purposes of this section and §§ 1.401(m)–2 through 1.401(m)–5. Accordingly, notwithstanding § 1.410(b)–7(d)(2), an ESOP and a non-ESOP which are different plans (within the meaning of § 1.410(b)–7(b)) are permitted to be aggregated for these purposes.

(c) *Additional requirements*—(1) *Separate testing for employee contributions and matching contributions.* Under § 1.410(b)–7(c)(1), the group of employees who are eligible to make employee contributions or eligible to receive matching contributions must satisfy the requirements of section 410(b) as if those employees were covered under a separate plan. The determination of whether the separate plan satisfies the requirements of section 410(b) must be made without regard to the modifications to the disaggregation rules set forth in paragraph (b)(4)(v) of this section. In addition, except as expressly permitted under section 401(k), 410(b)(2)(A)(ii), or 416(c)(2)(A), employee contributions, matching contributions and elective contributions taken into account under § 1.401(m)–2(a)(6) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the employee contributions or matching contributions are made) satisfy the requirements of section 401(a). *See also* § 1.401(a)(4)–11(g)(3)(vii) for special rules relating to corrections of violations of the minimum coverage requirements or discriminatory rates of matching contributions.

(2) *Plan provision requirement.* A plan that provides for employee contributions or matching contributions satisfies this section only if it provides that the nondiscrimination requirements of section 401(m) will be met. Thus, the plan must provide for satisfaction of one of the specific alternatives described in paragraph (b)(1) of this section and, if with respect to that alternative there are optional choices, which of the optional choices will apply. For example, a plan that uses the ACP test of section 401(m)(2), as described in paragraph (b)(1)(i) of this section, must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ACP for eligible NHCEs for the first plan year is 3% or the ACP for the eligible NHCEs for the first plan year. Similarly, a plan that uses the safe harbor method of section 401(m)(11), as described in paragraph (b)(1)(ii) of this section, must specify whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution and is not permitted to provide that ACP testing will be used if the requirements for the safe harbor are not satisfied. For purposes of this paragraph (c)(2), a plan may incorporate by reference the provisions of section 401(m)(2) and § 1.401(m)–2 if that is the nondiscrimination test being applied.

(d) *Effective date.* This section and §§ 1.401(m)–2 through 1.401(m)–5 apply to plan years that begin on or after the date that is 12 months after the issuance of these regulations in final form.

§ 1.401(m)–2 ACP test.

(a) *Actual contribution percentage (ACP) test*—(1) *In general*—(i) *ACP test formula.* A plan satisfies the ACP test for a plan year only if—

(A) The ACP for the eligible HCEs for the plan year is not more than the ACP for the eligible NHCEs for the applicable year multiplied by 1.25; or

(B) The excess of the ACP for the eligible HCEs for the plan year over the ACP for the eligible NHCEs for the applicable year is not more than 2 percentage points, and the ACP for the eligible HCEs for the plan year is not more than the ACP for the eligible NHCEs for the applicable year multiplied by 2.

(ii) *HCEs as sole eligible employees.* If, for the applicable year there are no eligible NHCEs (*i.e.*, all of the eligible employees under the plan for the applicable year are HCEs), the plan is deemed to satisfy the ACP test.

(iii) *Special rule for early participation.* If a plan providing for employee contributions or matching contributions provides that employees are eligible to participate before they have completed the minimum age and service requirements of section 410(a)(1)(A), and if the plan applies section 410(b)(4)(B) in determining whether the plan meets the requirements of section 410(b)(1), then in determining whether the plan meets the requirements under paragraph (a)(1) of this section either—

(A) Pursuant to section 401(m)(5)(C), the ACP test is performed under the plan (determined without regard to disaggregation under § 1.410(b)–7(c)(3)), using the ACP for all eligible HCEs for the plan year and the ACP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A); or

(B) Pursuant to § 1.401(m)–1(b)(4), the plan is disaggregated into separate plans and the ACP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A).

(2) *Determination of ACP*—(i) *General rule.* The ACP for a group of eligible employees (either eligible HCEs or eligible NHCEs) for a plan year or applicable year is the average of the ACRs of eligible employees in the group for that year. The ACP for a group of eligible employees is calculated to the nearest hundredth of a percentage point.

(ii) *Determination of applicable year under current year and prior year testing method.* The ACP test is applied using the prior year testing method or the current year testing method. Under the prior year testing method, the applicable year for determining the ACP for the eligible NHCEs is the plan year immediately preceding the plan year for which the ACP test is being calculated. Under the prior year testing method, the ACP for the eligible NHCEs is determined using the ACRs for the eligible employees who were NHCEs in that preceding plan year, regardless of whether those NHCEs are eligible employees or NHCEs in the plan year for which the ACP test is being performed. Under the current year testing method, the applicable year for determining the ACP for eligible NHCEs is the same plan year as the plan year for which the ACP test is being calculated. Under either method, the ACP for the eligible HCEs is the determined using the ACRs of eligible employees who are HCEs for the plan year for which the ACP test is being performed. *See* paragraph (c) of this section for additional rules for the prior year testing method.

(3) *Determination of ACR*—(i) *General rule.* The ACR of an eligible employee for the plan year or applicable year is the sum of the employee contributions and matching contributions taken into account with respect to such employee (determined under the rules of paragraphs (a)(4) and (a)(5) of this section), and the qualified nonelective and elective contributions taken into account under paragraph (a)(6) of this section for the year, divided by the employee's compensation taken into account for the year. The ACR is calculated to the nearest hundredth of a

percentage point. If no employee contributions, matching contributions, elective contributions, or qualified nonelective contributions are taken into account under this section with respect to an eligible employee for the year, the ACR of the employee is zero.

(ii) *ACR of HCEs eligible under more than one plan*—(A) *General rule.* Pursuant to section 401(m)(2)(B), the ACR of an HCE who is an eligible employee in more than one plan of an employer to which matching contributions or employee contributions are made is calculated by treating all contributions with respect to such HCE under any such plan as being made under the plan being tested. Thus, the ACR for such an HCE is calculated by accumulating all matching contributions and employee contributions under any plan (other than a plan described in paragraph (a)(3)(ii)(B) of this section) that would be taken into account under this section for the plan year, if the plan under which the contribution was made applied this section and had the same plan year. For example, in the case of a plan with a 12-month plan year, the ACR for the plan year of that plan for an HCE who participates in multiple plans of the same employer that provide for matching contributions or employee contributions is the sum of all such contributions during such 12-month period that would be taken into account with respect to the HCE under all plans in which the HCE is an eligible employee, divided by the HCE's compensation for that 12-month period (determined using the compensation definition for the plan being tested), without regard to the plan year of the other plans and whether those plans are satisfying this section or § 1.401(m)–3.

(B) *Plans not permitted to be aggregated.* Contributions under plans that are not permitted to be aggregated under § 1.401(m)–1(b)(4) (determined without regard to the prohibition on aggregating plans with inconsistent testing methods set forth in § 1.401(m)–1(b)(4)(iii)(B) and the prohibition on aggregating plans with different plan years set forth in § 1.410(b)–7(d)(5)) are not aggregated under this paragraph (a)(3)(ii).

(iii) *Example.* The following example illustrates the application of paragraph (a)(3)(ii) of this section. See also § 1.401(k)–2(a)(3)(iii) for additional examples of the application of the parallel rule under section 401(k)(3)(A). The example is as follows:

Example. Employee A, an HCE with compensation of $120,000, is eligible to make employee contributions under Plan S and Plan T, two calendar-year profit-sharing plans of Employer H. Plan S and Plan T use the same definition of compensation. Plan S provides a match equal to 50% of each employee's contributions and Plan T has no match. During the current plan year, Employee A elects to contribute $4,000 in employee contributions to Plan T and $4,000 in employee contributions to Plan S. There are no other contributions made on behalf of Employee A. Each plan must calculate Employee A's ACR by dividing the total employee contributions by Employee A and matching contributions under both plans by $120,000. Therefore, Employee A's ACR under each plan is 8.33% ($4,000 + $4,000 + $2,000/$120,000).

(4) *Employee contributions and matching contributions taken into account under the ACP test*—(i) *Employee contributions.* An employee contribution is taken into account in determining the ACR for an eligible employee for the plan year or applicable year in which the contribution is made. For purposes of the preceding sentence, an amount withheld from an employee's pay (or a payment by the employee to an agent of the plan) is treated as contributed at the time of such withholding (or payment) if the funds paid are transmitted to the trust within a reasonable period after the withholding (or payment).

(ii) *Recharacterized elective contributions.* Excess contributions recharacterized in accordance with § 1.401(k)–2(b)(3) are taken into account as employee contributions for the plan year that includes the time at which the excess contribution is includible in the gross income of the employee under § 1.401(k)–2(b)(3)(ii)(A).

(iii) *Matching contributions.* A matching contribution is taken into account in determining the ACR for an eligible employee for a plan year or applicable year only if each of the following requirements is satisfied—

(A) The matching contribution is allocated to the employee's account under the terms of the plan as of a date within that year;

(B) The matching contribution is made on account of (or the matching contribution is allocated on the basis of) the employee's elective deferrals or employee contributions for that year; and

(C) The matching contribution is actually paid to the trust no later than the end of the 12-month period immediately following the year that contains that date.

(5) *Matching contributions not taken into account under the ACP test*—(i) *General rule.* Matching contributions that do not satisfy the requirements of paragraph (a)(4)(iii) of this section may not be taken into account in the ACP test for the plan year with respect to which the contributions were made, or for any other plan year. Instead, the amount of the matching contributions must satisfy the requirements of section 401(a)(4) (without regard to the ACP test) for the plan year for which they are allocated under the plan as if they were nonelective contributions and were the only nonelective contributions for that year. *See* §§ 1.401(a)(4)–1(b)(2)(ii)(B) and 1.410(b)–7(c)(1).

(ii) *Disproportionate matching contributions*—(A) *Matching contributions in excess of 100%.* A matching contribution with respect to any employee contribution or elective deferral for an NHCE is not taken into account under the ACP test to the extent the matching rate with respect to the employee contribution or elective deferral exceeds the greater of 100% and 2 times the plan's representative matching rate.

(B) *Representative matching rate.* For purposes of this paragraph (a)(5)(ii), the plan's representative matching rate is the lowest matching rate for any eligible NHCE among a group of NHCEs that consists of half of all eligible NHCEs in the plan for the plan year who make elective deferrals or employee contributions for the plan year (or, if greater, the lowest matching rate for all eligible NHCEs in the plan who are employed by the employer on the last day of the plan year and who make elective deferrals or employee contributions for the plan year).

(C) *Definition of matching rate.* For purposes of this paragraph (a)(5)(ii), the matching rate for an employee is the matching contributions made for such employee divided by the elective deferrals or employee contributions that are being matched.

(iii) *Qualified matching contributions used to satisfy the ADP test.* Qualified matching contributions that are taken into account for the ADP test of section 401(k)(3) under § 1.401(k)–2(a)(6) are not taken into account in determining an eligible employee's ACR.

(iv) *Matching contributions taken into account under safe harbor provisions.* A plan that satisfies the ACP safe harbor requirements of section 401(m)(11) for a plan year but nonetheless must satisfy the requirements of this section because it provides for employee contributions for such plan year is permitted to apply this section disregarding all matching contributions with respect to all eligible employees. In addition, a plan that satisfies the ADP safe harbor requirements of § 1.401(k)–3 for a plan year using qualified matching contributions but does not satisfy the ACP safe harbor requirements of section 401(m)(11) for such plan year is permitted to apply this section by

excluding matching contributions with respect to all eligible employees that do not exceed 4% of each employee's compensation. If a plan disregards matching contributions pursuant to this paragraph (a)(5)(iv), the disregard must apply with respect to all eligible employees.

(v) *Treatment of forfeited matching contributions.* A matching contribution that is forfeited because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution is not taken into account for purposes of this section.

(6) *Qualified nonelective contributions and elective contributions that may be taken into account under the ACP test.* Qualified nonelective contributions and elective contributions may be taken into account in determining the ACR for an eligible employee for a plan year or applicable year, but only to the extent the contributions satisfy the following requirements—

(i) *Timing of allocation.* The qualified nonelective contribution is allocated to the employee's account as of a date within that year (within the meaning of § 1.401(k)–2(a)(4)(i)(A)) and the elective contribution satisfies § 1.401(k)–2(a)(4)(i). Consequently, under the prior year testing method, in order to be taken into account in calculating the ACP for the group of eligible NHCEs for the applicable year, a qualified nonelective contribution must be contributed no later than the end of the 12-month period following the applicable year even though the applicable year is different than the plan year being tested.

(ii) *Elective contributions taken into account under the ACP test.* Elective contributions may be taken into account for the ACP test only if the cash or deferred arrangement under which the elective contributions are made is required to satisfy the ADP test in § 1.401(k)–2(a)(1) and, then only to the extent that the cash or deferred arrangement would satisfy that test, including such elective contributions in the ADP for the plan year or applicable year. Thus, for example, elective deferrals made pursuant to a salary reduction agreement under an annuity described in section 403(b) are not permitted to be taken into account in an ACP test. Similarly, elective contributions under a cash or deferred arrangement that is using the section 401(k) safe harbor described in § 1.401(k)–3 can not be taken into account in an ACP test.

(iii) *Requirement that amount satisfy section 401(a)(4).* The amount of nonelective contributions, including those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ADP test under paragraph § 1.401(k)–2(a)(6), and the amount of nonelective contributions, excluding those qualified nonelective contributions taken into account under this paragraph (a)(6) for the ACP test and those qualified nonelective contributions taken into account for the ADP test under paragraph § 1.401(k)–2(a)(6), satisfies the requirements of section 401(a)(4). See § 1.401(a)(4)–1(b)(2). In the case of an employer that is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan, the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(iii) must be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on an employer-wide basis. Conversely, in the case of an employer that is treated as operating qualified separate lines of business, and does not apply the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan, then the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(iii) is not permitted to be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on that basis.

(iv) *Aggregation must be permitted.* The plan that provides for employee or matching contributions and the plan or plans to which the qualified nonelective contributions or elective contributions are made are plans that would be permitted to be aggregated under § 1.401(m)–1(b)(4). If the plan year of the plan that provides for employee or matching contributions is changed to satisfy the requirement under § 1.410(b)–7(d)(5) that aggregated plans have the same plan year, qualified nonelective contributions and elective contributions may be taken into account in the resulting short plan year only if such qualified nonelective and elective contributions could have been taken into account under an ADP test for a plan with that same short plan year.

(v) *Disproportionate contributions not taken into account*—(A) *General rule.* Qualified nonelective contributions cannot be taken into account for an applicable year for an NHCE to the extent such contributions exceed the product that NHCE's compensation and the greater of 5% and 2 times the plan's representative contribution rate. Any qualified nonelective contribution taken into account in an ADP test under § 1.401(k)–2(a)(6) (including the determination of the representative contribution rate for purposes of § 1.401(k)–2(a)(6)(iv)(B)) is not permitted to be taken into account for purposes of this paragraph (a)(6) (including the determination of the representative contribution rate for purposes of paragraph (a)(6)(v)(B) of this section).

(B) *Definition of representative contribution rate.* For purposes of this paragraph (a)(6)(v), the plan's representative contribution rate is the lowest applicable contribution rate of any eligible NHCE among a group of eligible NHCEs that consists of half of all eligible NHCEs for the plan year (or, if greater, the lowest applicable contribution rate of any eligible NHCE in the group of all eligible NHCEs for the applicable year and who is employed by the employer on the last day of the applicable year).

(C) *Definition of applicable contribution rate.* For purposes of this paragraph (a)(6)(v), the applicable contribution rate for an eligible NHCE is the sum of the matching contributions taken into account under this section for the employee for the plan year and the qualified nonelective contributions made for that employee for the plan year, divided by that employee's compensation for the same period.

(vi) *Contribution only used once.* Qualified nonelective contributions cannot be taken into account under this paragraph (a)(6) to the extent such contributions are taken into account for purposes of satisfying any other ACP test, any ADP test, or the requirements of § 1.401(k)–3, 1.401(m)–3 or 1.401(k)–4. Thus, for example, qualified nonelective contributions that are made pursuant to § 1.401(k)–3(b) cannot be taken into account under the ACP test. Similarly, if a plan switches from the current year testing method to the prior year testing method pursuant to § 1.401(m)–2(c)(1), qualified nonelective contributions that are taken into account under the current year testing method for a plan year may not be taken into account under the prior year testing method for the next plan year.

(7) *Examples.* The following examples illustrate the application of this paragraph (a). See § 1.401(k)–2(a)(6) for additional examples of the parallel rules under section 401(k)(3)(A). The examples are as follows:

Example 1. (i) Employer L maintains Plan U, a profit-sharing plan under which $.50 matching contributions are made for each dollar of employee contributions. Plan U uses

the current year testing method. The chart below shows the average employee contributions (as a percentage of compensation) and matching contributions (as a percentage of compensation) for Plan U's highly compensated employees and nonhighly compensated employees for the 2006 plan year:

	Employee contributions	Matching contributions	Actual contributions percentage
Highly compensated employees	4%	2%	6%
Nonhighly compensated employees	3%	1.5%	4.5%

(ii) The matching rate for all NHCEs is 50% and thus the matching contributions are not disproportionate under paragraph (a)(5)(ii) of this section. Accordingly, they are taken into account in determining the ACR of eligible employees, as shown in the following table.

(iii) Because the ACP for the HCEs (6.0%) exceeds 5.63% (4.5% × 1.25), Plan U does not satisfy the ACP test under paragraph (a)(1)(i)(A) of this section. However, because the ACP for the HCEs does not exceed the ACP for the NHCEs by more than 2 percentage points and the ACP for the HCEs does not exceed the ACP for the NHCEs multiplied by 2 (4.5% × 2 = 9%), the plan satisfies the ACP test under paragraph (a)(1)(i)(B) of this section.

Example 2. (i) Employees A through F are eligible employees in Plan V, a profit-sharing plan of Employer M that includes a cash or deferred arrangement and permits employee contributions. Under Plan V, a $.50 matching contribution is made for each dollar of elective contributions and employee contributions. Plan V uses the current year testing method and does not provide for elective contributions to be taken into account in determining an eligible employee's ACR. For the 2006 plan year, Employees A and B are HCEs and the remaining employees are NHCEs. The compensation, elective contributions, employee contributions, and matching contributions for the 2006 plan year are shown in the following table:

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
A	$190,000	$15,000	$3,500	$9,250
B	100,000	5,000	10,000	7,500
C	85,000	12,000	0	6,000
D	70,000	9,500	0	4,750
E	40,000	10,000	0	5,000
F	10,000	0	0	0

(ii) The matching rate for all NHCEs is 50% and thus the matching contributions are not disproportionate under paragraph (a)(5)(ii) of this section. Accordingly, they are taken into account in determining the ACR of eligible employees, as shown in the following table:

Employee	Compensation	Elective contributions	Matching contributions	ACR
A	$190,000	$3,500	$9,250	6.71%
B	100,000	10,000	7,500	17.50%
C	85,000	0	6,000	7.06%
D	70,000	0	4,750	6.79%
E	40,000	0	5,000	12.50%
F	10,000	0	0	0

(iii) The ACP for the HCEs is 12.11% ((6.71% + 17.50%)/2). The ACP for the NHCEs is 6.59% ((7.06% + 6.79% + 12.50% + 0.%)/4). Plan V fails to satisfy the ACP test under paragraph (a)(1)(i)(A) of this section because the ACP of highly compensated employees is more than 125% of the ACP of the nonhighly compensated employees (6.59% × 1.25 = 8.24%). In addition, Plan V fails to satisfy the ACP test under paragraph (a)(1)(i)(B) of this section because the ACP for the HCEs exceeds the ACP of the other employees by more than 2 percentage points (6.59% + 2% = 8.59%). Therefore, the plan fails to satisfy the requirements of section 401(m)(2) and paragraph (a)(1) of this section unless the ACP failure is corrected under paragraph (b) of this section.

Example 3. (i) The facts are the same as Example 2, except that the plan provides that the nonhighly compensated employees' elective contributions may be used to meet the requirements of section 401(m) to the extent needed under that section.

(ii) Pursuant to paragraph (a)(6)(ii) of this section, the $10,000 of elective contributions for Employee E may be taken into account in determining the ACP rather than the ADP to the extent that the plan satisfies the requirements of § 1.401(k)–2(a)(1) excluding from the ADP this $10,000. In this case, if the $10,000 were excluded from the ADP for the NHCEs, the ADP for the highly compensated employees is 6.45% (7.89% + 5.00%)/2and the ADP for the nonhighly compensated employees would be 6.92% (14.12% + 13.57% + 0% +0%)/4) and the plan would satisfy the requirements of § 1.401(k)–2(a)(1) excluding from the ADP the elective contributions for NHCEs that are taken into account under section 401(m).

(iii) After taking into account the $10,000 of elective contributions for Employee E in the ACP test, the ACP for the nonhighly compensated employees is 12.84% (7.06% + 6.79% + 37.50% + 0%)/4. Therefore the plan satisfies the ACP test because the ACP for the HCEs (12.11%) is less than 1.25 times the ACP for the nonhighly compensated employees.

Example 4. (i) The facts are the same as *Example 2,* except that Plan V provides for a higher than 50% match rate on the elective contributions and employee contributions for all NHCEs. The match rate is defined as the rate, rounded up to the next whole percent, necessary to allow the plan to satisfy the ACP test, but not in excess of 100%. In this case, an increase in the match rate from 50% to 74% will be sufficient to allow the plan to satisfy the ACP test. Thus, for the 2006 plan year, the compensation, elective contributions, employee contributions, matching contributions at a 74% match rate of the eligible NHCEs (employees C through F) are shown in the following table:

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
C	$85,000	$12,000	$0	$8,880
D	70,000	9,500	0	7,030
E	40,000	10,000	0	7,400
F	10,000	0	0	0

(ii) The matching rate for all NHCEs is 74% and thus the matching contributions are not disproportionate under paragraph (a)(5)(ii) of this section. Therefore, the matching contributions may be taken into account in determining the ACP for the NHCEs.

(iii) The ACP for the NHCEs is 9.75% (10.45% + 10.04% + 18.50% + 0%)/4. Because the ACP for the HCEs (12.11%) is less than 1.25 times the ACP for the NHCEs, the plan satisfies the requirements of section 401(m).

Example 5. (i) The facts are the same as *Example 4,* except that: Employee E's elective contributions are $2,000 (rather than $10,000) and pursuant to paragraph (a)(6)(ii) of this section, the $2,000 of elective contributions for Employee E are taken into account in determining the ACP rather than the ADP. In addition, Plan V provides that the higher match rate is not limited to 100% and applies only for a specified group of nonhighly compensated employees. The only member of that group is Employee E. Under the plan provision, the higher match rate is a 400% match. Thus, for the 2006 plan year, the compensation, elective contributions, employee contributions, matching contributions of the eligible NHCEs (employees C through F) are shown in the following table:

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
C	$85,000	$12,000	$0	$6,000
D	70,000	9,500	0	4,750
E	40,000	2,000	0	8,000
F	10,000	0	0	0

(ii) If the entire matching contribution made on behalf of Employee E were taken into account under the ACP test, Plan V would satisfy the test, because the ACP for the NHCEs would be 9.71% (7.06% + 6.79% + 25.00% + 0%)/4. Because the ACP for the HCEs (12.11%) is less than 1.25 times what the ACP for the NHCEs would be, the plan would satisfy the requirements of section 401(m).

(iii) Pursuant to paragraph (a)(5)(ii) of this section, however, matching contributions for an eligible NHCE that are based on a matching rate in excess of the greater of 100% and twice the plan's representative matching rate cannot be taken into account in applying the ACP test. The plan's representative matching rate is the lowest matching rate for any eligible employee in a group of NHCEs that is at least half of all eligible employees who are NHCEs in the plan for the plan year who make elective contributions or employee contributions for the plan year. For Plan V, the group of NHCEs who make such contributions consists of Employees C, D and E. The matching rates for these three employees are 50%, 50% and 400% respectively. The lowest matching rate for a group of NHCEs that is at least ½ of all the NHCEs who make elective contributions or employee contributions (or 2 NHCEs) is 50%. Because 400% is more than twice the plan's representative matching rate, only the matching contributions made on behalf of Employee E that do not exceed 100% (or in this case $2,000) satisfy the requirements of paragraph (a)(5)(ii) of this section and may be taken into account under the ACP test. Accordingly, the ACP for the NHCEs is 5.96% (7.06% + 6.79% + 10% + 0%)/4 and the plan fails to satisfy the requirements of section 401(m)(2) and paragraph (a)(1) of this section unless the ACP failure is corrected under paragraph (b) of this section.

Example 6. (i) The facts are the same as *Example 2,* except that Plan V provides a QNEC equal to 13% of pay for Employee F that will be taken into account under the ACP test to the extent the contributions satisfy the requirements of paragraph (a)(6) of this section.

(ii) Pursuant to paragraph (a)(6)(v) of this section, a QNEC cannot be taken into account in determining an NHCE's ACR to the extent it exceeds the greater of 5% and the product of the employee's compensation and the plan's representative contribution rate. The plan's representative contribution rate is two times the lowest applicable contribution rate for any eligible employee in a group of NHCEs that is at least half of all eligible employees who are NHCEs in the plan for the plan year. For Plan V, the applicable contribution rates for Employees C, D, E and F are 7.06%, 6.79%, 12.5% and 13% respectively. The lowest applicable rate for a group of NHCEs that is at least ½ of all the NHCEs is 12.50% (the lowest applicable rate for the group of NHCEs that consists of Employees E and F).

(iii) Under paragraph (a)(6)(v)(B) of this section, the plan's representative contribution rate is 2 times 12.50% or 25.00%. Accordingly, the QNECs for Employee F can be taken into account under the ACP test only to the extent they do not exceed 25.00% of compensation. In this case, all of the QNECs for Employee F may be taken into account under the ACP test.

(iv) After taking into account the QNECs for Employee F, the ACP for the NHCEs is 9.84% (7.06% + 6.79% + 12.50% + 13%)/4. Because the ACP for the HCEs (12.11%) is less than 1.25 times the ACP for the NHCEs, the plan satisfies the requirements of section 401(m)(2) and paragraph (a)(1) of this section.

(b) *Correction of excess aggregate contributions*—(1) *Permissible correction methods*—(i) *In general.* A plan that provides for employee contributions or matching contributions does not fail to satisfy the requirements of section 401(m)(2) and paragraph (a)(1) of this section if the employer, in accordance with the terms of the plan, uses either of the following correction methods—

(A) *Additional contributions.* The employer makes additional contributions that are taken into account for the ACP test under this section that, in combination with the other contributions taken into account under this section, allow the plan to satisfy the requirements of paragraph (a)(1) of this section.

(B) *Excess aggregate contributions distributed or forfeited.* Excess aggregate contributions are distributed or forfeited in accordance with paragraph (b)(2) of this section.

(ii) *Combination of correction methods.* A plan may provide for the use of either of the correction methods described in paragraph (b)(1)(i) of this section, may limit employee contributions or matching contributions in a manner that prevents excess aggregate contributions from being made, or may use a combination of these methods, to avoid or correct excess aggregate contributions. If a plan uses a combination of correction methods, any contributions made under paragraph (b)(1)(i)(A) of this section must be taken into account before application of the correction method in paragraph (b)(1)(i)(B) of this section.

(iii) *Exclusive means of correction.* A failure to satisfy the requirements of paragraph (a)(1) of this section may not be corrected using any method other than one described in paragraph (b)(1)(i) or (ii) of this section. Thus, excess aggregate contributions for a plan year may not be corrected by forfeiting vested matching contributions, distributing nonvested matching contributions, recharacterizing matching contributions, or not making matching contributions required under the terms of the plan. Similarly, excess aggregate contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. In addition, excess aggregate contributions may not be corrected using the retroactive correction rules of § 1.401(a)(4)–11(g). *See* § 1.401(a)(4)–11(g)(3)(vii) and (5).

(2) *Correction through distribution*—(i) *General rule.* This paragraph (b)(2) contains the rules for correction of excess aggregate contributions through a distribution from the plan. Correction through a distribution generally involves a four step process. First, the plan must determine, in accordance with paragraph (b)(2)(ii) of this section, the total amount of excess aggregate contributions that must be distributed under the plan. Second, the plan must apportion the total amount of excess aggregate contributions among the HCEs in accordance with paragraph (b)(2)(iii) of this section. Third, the plan must determine the income allocable to excess aggregate contributions in accordance with paragraph (b)(2)(iv) of this section. Finally, the plan must distribute the apportioned contributions, together with allocable income (or forfeit the apportioned matching contributions, if forfeitable) in accordance with paragraph (b)(2)(v) of this section. Paragraph (b)(2)(vi) of this section provides rules relating to the tax treatment of these distributions.

(ii) *Calculation of total amount to be distributed.* The following procedures must be used to determine the total amount of the excess aggregate contributions to be distributed—

(A) *Calculate the dollar amount of excess aggregate contributions for each HCE.* The amount of excess aggregate contributions attributable to an HCE for a plan year is the amount (if any) by which the HCE's contributions taken into account under this section must be reduced for the HCE's ACR to equal the highest permitted ACR under the plan. To calculate the highest permitted ACR under a plan, the ACR of the HCE with the highest ACR is reduced by the amount required to cause that HCE's ACR to equal the ACR of the HCE with the next highest ACR. If a lesser reduction would enable the plan to satisfy the requirements of paragraph (b)(2)(ii)(C) of this section, only this lesser reduction applies.

(B) *Determination of the total amount of excess aggregate contributions.* The process described in paragraph (b)(2)(ii)(A) of this section must be repeated until the plan would satisfy the requirements of paragraph (b)(2)(ii)(C) of this section. The sum of all reductions for all HCEs determined under paragraph (b)(2)(ii)(A) of this section is the total amount of excess aggregate contributions for the plan year.

(C) *Satisfaction of ACP.* A plan satisfies this paragraph (b)(2)(ii)(C) if the plan would satisfy the requirements of paragraph (a)(1)(i) of this section if the ACR for each HCE were determined after the reductions described in paragraph (b)(2)(ii)(A) of this section.

(iii) *Apportionment of total amount of excess aggregate contributions among the HCEs.* The following procedures must be used in apportioning the total amount of excess aggregate contributions determined under paragraph (b)(2)(ii) of this section among the HCEs—

(A) *Calculate the dollar amount of excess aggregate contributions for each HCE.* The contributions with respect to the HCE with the highest dollar amount of contributions taken into account under this section are reduced by the amount required to cause that HCE's contributions to equal the dollar amount of contributions taken into account under this section for the HCE with the next highest dollar amount of such contributions. If a lesser apportionment to the HCE would enable the plan to apportion the total amount of excess aggregate contributions, only the lesser apportionment would apply.

(B) *Limit on amount apportioned to any HCE.* For purposes of this paragraph (b)(2)(iii), the contributions for an HCE who is an eligible employee in more than one plan of an employer to which matching contributions and employee contributions are made is determined by adding together all contributions otherwise taken into account in determining the ACR of the HCE under the rules of paragraph (a)(3)(ii) of this section. However, the amount of contributions apportioned with respect to an HCE must not exceed the amount of contributions taken into account under this section that were actually made on behalf of the HCE to the plan for the plan year. Thus, in the case of an HCE who is an eligible employee in more than one plan of the same employer to which employee contributions or matching contributions are made and whose ACR is calculated in accordance with paragraph (a)(3)(ii) of this section, the amount distributed under this paragraph (b)(2)(iii) will not exceed such contributions actually contributed to the plan for the plan year that are taken into account under this section for the plan year.

(C) *Apportionment to additional HCEs.* The procedure in paragraph (b)(2)(iii)(A) of this section must be repeated until the total amount of excess aggregate contributions have been apportioned.

(iv) *Income allocable to excess aggregate contributions*—(A) *General rule.* The income allocable to excess aggregate contributions is equal to the sum of the allocable gain or loss for the plan year and, to the extent the excess aggregate contributions are or will be credited with allocable gain or loss for the period after the close of the plan year (the gap period), the allocable gain or loss for the gap period.

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess aggregate contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participants' accounts. *See* § 1.401(a)(4)–1(c)(8).

(C) *Alternative method of allocating income for the plan year.* A plan may allocate income to excess aggregate contributions for the plan year by multiplying the income for the plan year allocable to employee contributions, matching contributions and other amounts taken into account under this section (including the contributions for the year), by a fraction, the numerator of which is the excess aggregate contributions for the employee for the plan year, and the denominator of which is the account balance attributable to employee contributions and matching contributions and other amounts taken into account under this section as of the beginning of the plan year (including any additional such contributions for the plan year).

(D) *Safe harbor method of allocating gap period income.* A plan may use the safe harbor method in this paragraph (b)(2)(iv)(D) to determine income on excess aggregate contributions for the gap period. Under this safe harbor method, income on excess aggregate contributions for the gap period is equal to 10% of the income allocable to excess aggregate contributions for the plan year that would be determined under paragraph (b)(2)(iv)(C) of this section,

multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of a month is treated as made on the last day of the preceding month and a distribution made after the fifteenth day of a month is treated as made on the last day of the month.

(E) *Alternative method of allocating plan year and gap period income.* A plan may determine the allocable gain or loss for the aggregate of the plan year and the gap period by applying the alternative method provided by paragraph (b)(2)(iv)(C) of this section to that aggregate period. This is accomplished by substituting the income for the plan year and the gap period for the income for the plan year and by substituting the contributions taken into account under this section for the plan year and the gap period for the contributions taken into account for the plan year in determining the fraction that is multiplied by that income.

(F) *Allocable income for recharacterized elective contributions.* If recharacterized elective contributions are distributed as excess aggregate contributions, the income allocable to the excess aggregate contributions is determined as if recharacterized elective contributions had been distributed as excess contributions. Thus, income must be allocated to the recharacterized amounts distributed using the methods in § 1.401(k)–2(b)(2)(iv).

(v) *Distribution and forfeiture.* Within 12 months after the close of the plan year in which the excess aggregate contribution arose, the plan must distribute to each HCE the contributions apportioned to such HCE under paragraph (b)(2)(iii) of this section (and the allocable income) to the extent they are vested or forfeit such amounts, if forfeitable. Except as otherwise provided in this paragraph (b)(2)(v), a distribution of excess aggregate contributions must be in addition to any other distributions made during the year and must be designated as a corrective distribution by the employer. In the event of a complete termination of the plan during the plan year in which an excess aggregate contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of an HCE is distributed prior to when the plan makes a distribution of excess aggregate contributions in accordance with this paragraph (b)(2), the distribution is deemed to have been a corrective distribution of excess aggregate contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(vi) *Tax treatment of corrective distributions*—(A) *General rule.* Except as otherwise provided in paragraph (b)(2)(vi)(B) of this section, a corrective distribution of excess aggregate contributions (and income) that is made within 2½ months after the end of the plan year for which the excess aggregate contributions were made is includible in the employee's gross income for the taxable year of the employee ending with or within the plan year for which the excess aggregate contributions were made. A corrective distribution of excess aggregate contributions (and income) that is made more than 2½ months after the plan year for which the excess aggregate contributions were made is includible in the employee's gross income in the taxable year of the employee in which distributed. The portion of the distribution that is treated as an investment in the contract under section 72 is determined without regard to any plan contributions other than those distributed as excess aggregate contributions. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t). *See* paragraph (b)(4) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year. *See also* § 1.402(c)–2, A–4 prohibiting rollover of distributions that are excess aggregate contributions.

(B) *Rule for de minimis distributions.* If the total amount of excess aggregate contributions determined under this paragraph (b)(2), and excess contributions determined under § 1.401(k)–2(b)(2) distributed to a recipient under a plan for any plan year is less than $100 (excluding income), a corrective distribution of excess aggregate contributions (and income) is includible in gross income in the recipient's taxable year in which the corrective distribution is made.

(3) *Other rules*—(i) *No employee or spousal consent required.* A distribution of excess aggregate contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(ii) *Treatment of corrective distributions and forfeited contributions as employer contributions.* Excess aggregate contributions (other than amounts attributable to employee contributions), including forfeited matching contributions, are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan. Forfeited matching contributions that are reallocated to the accounts of other participants for the plan year in which the forfeiture occurs are treated under section 415 as annual additions for the participants to whose accounts they are reallocated and for the participants from whose accounts they are forfeited.

(iii) *No reduction of required minimum distribution.* A distribution of excess aggregate contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9). *See* § 1.401(a)(9)–5, A–9(b).

(iv) *Partial correction.* Any distribution of less than the entire amount of excess aggregate contributions (and allocable income) is treated as a pro rata distribution of excess aggregate contributions and allocable income.

(v) *Matching contributions on excess contributions, excess deferrals and excess aggregate contributions*—(A) *Corrective distributions not permitted.* A matching contribution may not be distributed merely because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution.

(B) *Coordination with section 401(a)(4).* A matching contribution is taken into account under section 401(a)(4) even if the match is distributed, unless the distributed contribution is an excess aggregate contribution. This requires that, after correction of excess aggregate contributions, each level of matching contributions be currently and effectively available to a group of employees that satisfies section 410(b). *See* § 1.401(a)(4)–4(e)(3)(iii)(G). Thus, a plan that provides the same rate of matching contributions to all employees will not meet the requirements of section 401(a)(4) if employee contributions are distributed under this paragraph (b) to HCEs to the extent needed to meet the requirements of section 401(m)(2), while matching contributions attributable to employee contributions remain allocated to the HCEs' accounts. This is because the level of matching contributions will be higher for a group of employees that consists entirely of HCEs. Under section 411(a)(3)(G) and § 1.411(a)–4(b)(7), a plan may forfeit matching contributions attributable to excess contributions, excess aggregate contributions and excess deferrals to avoid a violation of

section 401(a)(4). *See also* § 1.401(a)(4)–11(g)(3)(vii)(B) regarding the use of additional allocations to the accounts of NHCEs for the purpose of correcting a discriminatory rate of matching contributions. A plan is permitted to provide for which contributions are to be distributed to satisfy the ACP test so as to avoid discriminatory matching rates that would otherwise violate section 401(a)(4). For example, the plan may provide that unmatched employee contributions will be distributed before matched employee contributions.

(vi) *No requirement for recalculation.* If the distributions and forfeitures described in paragraph (b)(2) of this section are made, the employee contributions and matching contributions are treated as meeting the nondiscrimination test of section 401(m)(2) regardless of whether the ACP for the HCEs, if recalculated after the distributions and forfeitures, would satisfy section 401(m)(2).

(4) *Failure to timely correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess aggregate contributions within 2½ months after the close of the plan year for which the excess aggregate contributions are made, the employer will be liable for a 10% excise tax on the amount of the excess aggregate contributions. *See* section 4979 and § 54.4979–1 of this chapter. Qualified nonelective contributions properly taken into account under paragraph (a)(6) of this section for a plan year may enable a plan to avoid having excess aggregate contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess aggregate contributions are not corrected within 12 months after the close of the plan year for which they were made, the plan will fail to meet the requirements of section 401(a)(4) for the plan year for which the excess aggregate contributions were made and all subsequent plan years in which the excess aggregate contributions remain in the trust.

(5) *Examples.* The following examples illustrate the application of this paragraph. See also § 1.401(k)–2(b) for additional examples of the parallel correction rules applicable to cash or deferred arrangements. For purposes of these examples, none of the plans provide for catch-up contributions under section 414(v). The examples are as follows:

Example 1. (i) Employer L maintains a plan that provides for employee contributions and fully vested matching contributions. The plan provides that failures of the ACP test are corrected by distribution. In 2006, the ACP for the eligible NHCEs is 6%. Thus, the ACP for the eligible HCEs may not exceed 8%. The three HCEs who participate have the following compensation, contributions, and ACRs:

Employee	Compensation	Employee contributions and matching contributions	Actual contribution ratio (in percent)
A	200,000	14,000	7
B	150,000	13,500	9
C	100,000	12,000	12
Average			9.33

(ii) The total amount of excess aggregate contributions for the HCEs is determined under paragraph (b)(2)(ii) of this section as follows: the matching and employee contributions of Employee C (the HCE with the highest ACR) is reduced by 3% of compensation (or $3,000) in order to reduce the ACR of that HCE to 9%, which is the ACR of Employee B.

(iii) Because the ACP of the HCEs determined after the $3,000 reduction still exceeds 8%, further reductions in matching contributions and employee contributions are necessary in order to reduce the ACP of the HCEs to 8%. The employee contributions and matching contributions for Employees B and C are reduced by an additional .5% of compensation or $1,250 ($750 and $500 respectively). Because the ACP of the HCEs determined after the reductions now equals 8%, the plan would satisfy the requirements of (a)(1)(ii) of this section.

(iv) The total amount of excess aggregate contributions ($4,250) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of matching contributions and employee contributions. Therefore, Employee A is apportioned $500 (the amount required to cause A's matching contributions and employee contributions to equal the next highest dollar amount of matching contributions and employee contributions).

(v) Because the total amount of excess aggregate contributions has not been apportioned, further apportionment is necessary. The balance ($3,750) of the total amount of excess aggregate contributions is apportioned equally among Employees A and B ($1,500 to each, the amount required to cause their contributions to equal the next highest dollar amount of matching contributions and employee contributions).

(vi) Because the total amount of excess aggregate contributions has not been apportioned, further apportionment is necessary. The balance ($750) of the total amount of excess aggregate contributions is apportioned equally among Employees A, B and C ($250 to each, the amount required to allocate the total amount of excess aggregate contributions for the plan).

(vii) Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess aggregate contributions equal to $2,250 ($500 + $1,500 + $250) and allocable income, Employee B receives a corrective distribution of $250 and allocable income and Employee C receives a corrective distribution of $1,750 ($1,500 + $250) and allocable income.

Example 2. (i) Employee D is the sole HCE who is eligible to participate in a cash or deferred arrangement maintained by Employer M. The plan that includes the arrangement, Plan X, permits employee contributions and provides a fully vested matching contribution equal to 50% of elective contributions. Plan X is a calendar year plan. Plan X corrects excess contributions by recharacterization and provides that failures of the ACP test are corrected by distribution. For the 2006 plan year, D's compensation is $200,000, and D's elective contributions are $15,000. The actual deferral percentages and actual contribution percentages for Employee D and the other eligible employees under Plan X are shown in the following table:

	Actual deferral percentage	Actual contribution percentage
Employee D	7.5	3.75
NHCEs	4	2

(ii) In February 2007, Employer M determines that D's actual deferral ratio must be reduced to 6%, or $12,000, which requires a recharacterization of $3,000 as an employee contribution. This increases D's actual contribution ratio to 5.25% ($7,500 in matching contributions plus $3,000 recharacterized as employee contributions, divided by $200,000 in compensation). Since D's actual contribution ratio must be limited to 4% for Plan X to satisfy the actual contribution percentage test, Plan X must distribute 1.25% or $2,500 of D's employee contributions and matching contributions together with allocable income. If $2,500 in matching contributions and allocable income is distributed, this will correct the excess aggregate contributions and will not result in a discriminatory rate of matching contributions. *See Example 8.*

Example 3. (i) The facts are the same as in Example 2, except that Employee D also had elective contributions under Plan Y, maintained by an employer unrelated to M. In January 2007, D requests and receives a distribution of $1,200 in excess deferrals from Plan X. Pursuant to the terms of Plan X, D forfeits the $600 match on the excess deferrals to correct a discriminatory rate of match.

(ii) The $3,000 that would otherwise have been recharacterized for Plan X to satisfy the actual deferral percentage test is reduced by the $1,200 already distributed as an excess deferral, leaving $1,800 to be recharacterized. *See* § 1.401(k)–2(b)(4)(i)(A). D's actual contribution ratio is now 4.35% ($7,500 in matching contributions plus $1,800 in recharacterized contributions less $600 forfeited matching contributions attributable to the excess deferrals, divided by $200,000 in compensation).

(iii) The matching and employee contributions for Employee D must be reduced by .35% of compensation in order to reduce the ACP of the HCEs to 4%. The plan must provide for forfeiture of additional matching contributions to prevent a discriminatory rate of matching contributions. *See Example 8.*

Example 4. (i) The facts are the same as in *Example 3,* except that D does not request a distribution of excess deferrals until March 2007. Employer X has already recharacterized $3,000 as employee contributions.

(ii) Under § 1.402(g)–1(e)(6), the amount of excess deferrals is reduced by the amount of excess contributions that are recharacterized. Because the amount recharacterized is greater than the excess deferrals, Plan X is neither required nor permitted to make a distribution of excess deferrals, and the recharacterization has corrected the excess deferrals.

Example 5. (i) For the 2006 plan year, Employee F defers $10,000 under Plan M and $6,000 under Plan N. Plans M and N, which have calendar plan years, are maintained by unrelated employers. Plan M provides a fully vested, 100% matching contribution, does not take elective contributions into account under section 401(m) or take matching contributions into account under section 401(k) and provides that excess contributions and excess aggregate contributions are corrected by distribution. Under Plan M, Employee F is allocated excess contributions of $600 and excess aggregate contributions of $1,600. Employee F timely requests and receives a distribution of the $1,000 excess deferral from Plan M and, pursuant to the terms of Plan M, forfeits the corresponding $1,000 matching contribution.

(ii) No distribution is required or permitted to correct the excess contributions because $1,000 has been distributed by Plan M as excess deferrals. The distribution required to correct the excess aggregate contributions (after forfeiting the matching contribution) is $600 ($1,600 in excess aggregate contributions minus $1,000 in forfeited matching contributions). If Employee F had corrected the excess deferrals of $1,000 by withdrawing $1,000 from Plan N, Plan M would have had to correct the $600 excess contributions in Plan M by distributing $600. Since Employee F then would have forfeited $600 (instead of $1,000) in matching contributions, Employee F would have had $1,000 ($1,600 in excess aggregate contributions minus $600 in forfeited matching contributions) remaining of excess aggregate contributions in Plan M. These would have been corrected by distributing an additional $1,000 from Plan M.

Example 6. (i) Employee G is the sole highly compensated employee in a profit sharing plan under which the employer matches 100% of employee contributions up to 2% of compensation, and 50% of employee contributions up to the next 4% of compensation. For the 2008 plan year, Employee G has compensation of $100,000 and makes a 7% employee contribution of $7,000. Employee G receives a 4% matching contribution or $4,000. Thus, Employee G's actual contribution ratio (ACR) is 11%. The actual contribution percentage for the nonhighly compensated employees is 5%, and the employer determines that Employee G's ACR must be reduced to 7% to comply with the rules of section 401(m).

(ii) In this case, the plan satisfies the requirements of section if it distributes the unmatched employee contributions of $1,000, and $2,000 of matched employee contributions with their related matches of $1,000. This would leave Employee G with 4% employee contributions, and 3% matching contributions, for an ACR of 7%. Alternatively, the plan could distribute all matching contributions and satisfy this section. However, the plan could not distribute $4,000 of Employee G's employee contributions without forfeiting the related matching contributions because this would result in a discriminatory rate of matching contributions. See also *Example 7.*

Example 7. (i) Employee H is an HCE in Employer X's profit sharing plan, which matches 100% of employee contributions up to 5% of compensation. The matching contribution is vested at the rate of 20% per year. In 2006, Employee H makes $5,000 in employee contributions and receives $5,000 of matching contributions. Employee H is 60% vested in the matching contributions at the end of the 2006 plan year. In February 2007, Employer X determines that Employee H has excess aggregate contributions of $1,000. The plan provides that only matching contributions will be distributed as excess aggregate contributions.

(ii) Employer X has two options available in distributing Employee H's excess contributions. The first option is to distribute $600 of vested matching contributions and forfeit $400 of nonvested matching contributions. These amounts are in proportion to Employee H's vested and nonvested interests in all matching contributions. The second option is to distribute $1,000 of vested matching contributions, leaving the nonvested matching contributions in the plan.

(iii) If the second option is chosen, the plan must also provide a separate vesting schedule for vesting these nonvested matching contributions. This is necessary because the nonvested matching contributions must vest as rapidly as they would have had no distribution been made. Thus, 50% must vest in each of the next 2 years.

(iv) The plan will not satisfy the nondiscriminatory availability requirement of section 401(a)(4) if only nonvested matching contributions are distributed because the effect is that matching contributions for HCEs vest more rapidly than those for NHCEs. See § 1.401(m)–1(e)(4).

Example 8. (i) Employer Y maintains a calendar year profit sharing plan that includes a cash or deferred arrangement. Elective contributions are matched at the rate of 100%. After-tax employee contributions are permitted under the plan only for nonhighly compensated employees and are matched at the same rate. No employees make excess deferrals. Employee J, a highly compensated employee, makes an $8,000 elective contribution and receives an $8,000 matching contribution.

(ii) Employer Y performs the actual deferral percentage (ADP) and the actual contribution percentage (ACP). To correct failures of the ADP and ACP tests, the plan distributes to A $1,000 of excess contributions and $500 of excess aggregate contributions. After the distributions, Employee J's contributions for the year are $7,000 of elective contributions and $7,500 of matching contributions. As a result, Employee J has received a higher effective rate of matching contributions than nonhighly compensated employees ($7,000 of elective contributions matched by $7,500 is an effective matching rate of 107 percent). If this amount remains in Employee J's account without correction, it will cause the plan to fail to satisfy section 401(a)(4), because only a highly compensated employee receives the higher matching contribution rate. The remaining $500 matching contribution may be forfeited (but not distributed) under section 411(a)(3)(G), if the plan so provides. The plan could instead correct the discriminatory rate of matching contributions by making additional allocations to the accounts of nonhighly compensated employees. See § 1.401(a)(4)–11(g)(3)(vii)(B) and (6), *Example 7.*

(c) *Additional rules for prior year testing method*—(1) *Rules for change in testing method.* A plan is permitted to change from the prior year testing method to the current year testing method for any plan year. A plan is permitted to change from the current

year testing method to the prior year testing method only in situations described in § 1.401(k)–2(c)(1)(ii). For purposes of this paragraph (c)(1), a plan that uses the safe harbor method described in § 1.401(m)–3 or a SIMPLE 401(k) plan is treated as using the current year testing method for that plan year.

(2) *Calculation of ACP under the prior year testing method for the first plan year*—(i) *Plans that are not successor plans.* If, for the first plan year of any plan (other than a successor plan), a plan uses the prior year testing method, the plan is permitted to use either that first plan year as the applicable year for determining the ACP for the eligible NHCEs, or 3% as the ACP for eligible NHCEs, for applying the ACP test for that first plan year. A plan (other than a successor plan) that uses the prior year testing method but has elected for its first plan year to use that year as the applicable year for determining the ACP for the eligible NHCEs is not treated as changing its testing method in the second plan year and is not subject to the limitations on double counting under paragraph (a)(6)(vi) of this section for the second plan year.

(ii) *First plan year defined.* For purposes of this paragraph (c)(2), the first plan year of any plan is the first year in which the plan provides for employee contributions or matching contributions. Thus, the rules of this paragraph (c)(2) do not apply to a plan (within the meaning of § 1.410(b)–7) for a plan year if for such plan year the plan is aggregated under § 1.401(m)–1(b)(4) with any other plan that provides for employee or matching contributions in the prior year.

(iii) *Plans that are successor plans.* A plan is a successor plan if 50% or more of the eligible employees for the first plan year were eligible employees under another plan maintained by the employer in the prior year that provides for employee contributions or matching contributions. If a plan that is a successor plan uses the prior year testing method for its first plan year, the ACP for the group of NHCEs for the applicable year must be determined under paragraph (c)(4) of this section.

(3) *Plans using different testing methods for the ACP and ADP test.* Except as otherwise provided in this paragraph (c)(3), a plan may use the current year testing method or prior year testing method for the ACP test for a plan year without regard to whether the current year testing method or prior year testing method is used for the ADP test for that year. For example, a plan may use the prior year testing method for the ACP test and the current year testing method for its ADP test for the plan year. However, plans that use different testing methods under this paragraph (c)(3) cannot use—

(i) The recharacterization method of § 1.401(k)–2(b)(3) to correct excess contributions for a plan year;

(ii) The rules of paragraph (a)(6)(ii) of this section to take elective contributions into account under the ACP test (rather than the ADP test); or

(iii) The rules of paragraph § 1.401(k)–2(a)(6) to take qualified matching contributions into account under the ADP test (rather than the ACP test).

(4) *Rules for plan coverage change*—(i) *In general.* A plan that uses the prior year testing method that experiences a plan coverage change during a plan year satisfies the requirements of this section for that year only if the plan provides that the ACP for the NHCEs for the plan year is the weighted average of the ACPs for the prior year subgroups.

(ii) *Optional rule for minor plan coverage changes.* If a plan coverage change occurs and 90% or more of the total number of the NHCEs from all prior year subgroups are from a single prior year subgroup, then, in lieu of using the weighted averages described in paragraph (c)(4)(i) of this section, the plan may provide that the ACP for the group of eligible NHCEs for the prior year under the plan is the ACP of the NHCEs for the prior year of the plan under which that single prior year subgroup was eligible.

(iii) *Definitions.* The following definitions apply for purposes of this paragraph (c)(4)—

(A) *Plan coverage change.* The term *plan coverage change* means a change in the group or groups of eligible employees under a plan on account of—

(*1*) The establishment or amendment of a plan;

(*2*) A plan merger or spinoff under section 414(l);

(*3*) A change in the way plans (within the meaning of § 1.410(b)–7) are combined or separated for purposes of § 1.401(m)–1(b)(4) (*e.g.*, permissively aggregating plans not previously aggregated under § 1.410(b)–7(d), or ceasing to permissively aggregate plans under § 1.410(b)–7(d));

(*4*) A reclassification of a substantial group of employees that has the same effect as amending the plan (*e.g.*, a transfer of a substantial group of employees from one division to another division); or

(*5*) A combination of any of the situations described in this paragraph (c)(4)(iii)(A).

(B) *Prior year subgroup.* The term *prior year subgroup* means all NHCEs for the prior plan year who, in the prior year, were eligible employees under a specific plan that provides for employee contributions or matching contributions maintained by the employer and who would have been eligible employees in the prior year under the plan being tested if the plan coverage change had first been effective as of the first day of the prior plan year instead of first being effective during the plan year. The determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether the NHCE terminated employment during the prior year.

(C) *Weighted average of the ACPs for the prior year subgroups.* The term *weighted average of the ACPs for the prior year subgroups* means the sum, for all prior year subgroups, of the adjusted ACPs for the plan year. The term *adjusted ACP with respect to a prior year subgroup* means the ACP for the prior plan year of the specific plan under which the members of the prior year subgroup were eligible employees on the first day of the prior plan year, multiplied by a fraction, the numerator of which is the number of NHCEs in the prior year subgroup and denominator of which is the total number of NHCEs in all prior year subgroups.

(iv) *Example.* The following example illustrates the application of this paragraph (c)(4). See also § 1.401(k)–2(c)(4) for examples of the parallel rules applicable to the ADP test. The example is as follows:

Example. (i) Employer B maintains two plans, Plan N and Plan P, each of which provides for employee contributions or matching contributions. The plans were not permissively aggregated under § 1.410(b)–7(d) for the 2005 testing year. Both plans use the prior year testing method. Plan N had 300 eligible employees who were NHCEs for 2005, and their ACP for that year was 6%. Plan P had 100 eligible employees who were NHCEs for 2005, and the ACP for those NHCEs for that plan was 4%. Plan N and Plan P are permissively aggregated under § 1.410(b)–7(d) for the 2006 plan year.

(ii) The permissive aggregation of Plan N and Plan P for the 2006 testing year under § 1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan NP). Therefore, the prior year ACP for the NHCEs under Plan NP for the 2006 testing year is the weighted average of the ACPs for the prior year subgroups.

(iii) The first step in determining the weighted average of the ACPs for the prior year subgroups is to identify the prior year subgroups. With respect to the 2006 testing year, an employee is a member of a prior year subgroup if the employee was an NHCE of Employer B for the 2005 plan year, was an eligible employee for the 2005 plan year under any section 401(k) plan maintained by Employer B, and would have been an eligible employee in the 2005 plan year under Plan NP if Plan N and Plan P had been

permissively aggregated under § 1.410(b)–7(d) for that plan year. The NHCEs who were eligible employees under separate plans for the 2005 plan year comprise separate prior year subgroups. Thus, there are two prior year subgroups under Plan NP for the 2006 testing year: the 300 NHCEs who were eligible employees under Plan N for the 2005 plan year and the 100 NHCEs who were eligible employees under Plan P for the 2005 plan year.

(iv) The weighted average of the ACPs for the prior year subgroups is the sum of the adjusted ACP with respect to the prior year subgroup that consists of the NHCEs who were eligible employees under Plan N, and the adjusted ACP with respect to the prior year subgroup that consists of the NHCEs who were eligible employees under Plan P. The adjusted ACP for the prior year subgroup that consists of the NHCEs who were eligible employees under Plan N is 4.5%, calculated as follows: 6% (the ACP for the NHCEs under Plan N for the prior year) x 300/400 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups), which equals 4.5%. The adjusted ACP for the prior year subgroup that consists of the NHCEs who were eligible employees under Plan P is 1%, calculated as follows: 4% (the ACP for the NHCEs under Plan P for the prior year) x 100/400 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups), which equals 1%. Thus, the prior year ACP for NHCEs under Plan NP for the 2006 testing year is 5.5% (the sum of adjusted ACPs for the prior year subgroups, 4.5% plus 1%).

§ 1.401(m)–3 Safe harbor requirements.

(a) *ACP test safe harbor.* Matching contributions under a plan satisfy the ACP safe harbor provisions of section 401(m)(11) for a plan year if the plan satisfies the safe harbor contribution requirement of paragraphs (b) or (c) of this section for the plan year, the limitations on matching contributions of paragraph (d) of this section, the notice requirement of paragraph (e) of this section, the plan year requirements of paragraph (f) of this section, and the additional rules of paragraphs (g), (h) and (j) of this section, as applicable. Pursuant to section 401(k)(12)(E)(ii), the safe harbor contribution requirement of paragraphs (b) and (c) of this section must be satisfied without regard to section 401(l). The contributions made under paragraphs (b) and (c) of this section are referred to as safe harbor nonelective contributions and safe harbor matching contributions, respectively.

(b) *Safe harbor nonelective contribution requirement.* A plan satisfies the safe harbor nonelective contribution requirement of this paragraph (b) if it satisfies the safe harbor nonelective contribution requirement of § 1.401(k)–3(b).

(c) *Safe harbor matching contribution requirement.* A plan satisfies the safe harbor matching contribution requirement of this paragraph (c) if it satisfies the safe harbor matching contribution requirement of § 1.401(k)–3(c).

(d) *Limitation on contributions*—(1) *General rule.* A plan that provides for matching contributions meets the requirements of this section only if it satisfies the limitations on contributions set forth in this paragraph (d).

(2) *Matching rate must not increase.* A plan that provides for matching contributions meets the requirements of this paragraph (d) only if the ratio of matching contributions on behalf of an employee under the plan for a plan year to the employee's elective deferrals and employee contributions, does not increase as the amount of an employee's elective deferrals and employee contributions increases.

(3) *Limit on matching contributions.* A plan that provides for matching contributions satisfies the requirements of this section only if—

(i) Matching contributions are not made with respect to elective deferrals or employee contributions that exceed 6% of the employee's safe harbor compensation (within the meaning of § 1.401(k)–3(b)(2)); and

(ii) Matching contributions that are discretionary do not exceed 4% of the employee's safe harbor compensation.

(4) *Limitation on rate of match.* A plan meets the requirements of this section only if the ratio of matching contributions on behalf of an HCE to that HCE's elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) for that plan year is no greater than the ratio of matching contributions to elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) that would apply with respect to any NHCE for whom the elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) are the same percentage of safe harbor compensation. An employee is taken into account for purposes of this paragraph (d)(4) if the employee is an eligible employee under the cash or deferred arrangement with respect to which the contributions required by paragraph (b) or (c) of this section are being made for a plan year. A plan will not fail to satisfy this paragraph (d)(4) merely because the plan provides that matching contributions will be made separately with respect to each payroll period (or with respect to all payroll periods ending with or within each month or quarter of a plan year) taken into account under the plan for the plan year, provided that matching contributions with respect to any elective deferrals or employee contributions made during a plan year quarter are contributed to the plan by the last day of the immediately following plan year quarter.

(5) *HCEs participating in multiple plans.* The rules of section 401(m)(2)(B) and § 1.401(m)–2(a)(3)(ii) apply for purposes of determining the rate of matching contributions under paragraph (d)(4) of this section. However, a plan will not fail to satisfy the safe harbor matching contribution requirements of this section merely because an HCE participates during the plan year in more than one plan that provides for matching contributions, provided that—

(i) The HCE is not simultaneously an eligible employee under two plans that provide for matching contributions maintained by an employer for a plan year; and

(ii) The period used to determine compensation for purposes of determining matching contributions under each such plan is limited to periods when the HCE participated in the plan.

(6) *Permissible restrictions on elective deferrals by NHCEs*—(i) *General rule.* A plan does not satisfy the safe harbor requirements of this section, if elective deferrals or employee contributions by NHCEs are restricted, unless the restrictions are permitted by this paragraph (d)(6).

(ii) *Restrictions on election periods.* A plan may limit the frequency and duration of periods in which eligible employees may make or change contribution elections under a plan. However, an employee must have a reasonable opportunity (including a reasonable period after receipt of the notice described in paragraph (e) of this section) to make or change a contribution election for the plan year. For purposes of this section, a 30-day period is deemed to be a reasonable period to make or change a contribution election.

(iii) *Restrictions on amount of contributions.* A plan is permitted to limit the amount of contributions that may be made by an eligible employee under a plan, provided that each NHCE who is an eligible employee is permitted (unless the employee is restricted under paragraph (d)(6)(v) of this section) to make contributions in an amount that is at least sufficient to receive the maximum amount of matching contributions available under the plan for the plan year, and the employee is permitted to elect any lesser amount of

contributions. However, a plan may require eligible employees to make contribution elections in whole percentages of compensation or whole dollar amounts.

(iv) *Restrictions on types of compensation that may be deferred.* A plan may limit the types of compensation that may be deferred or contributed by an eligible employee under a plan, provided that each eligible NHCE is permitted to make contributions under a definition of compensation that would be a reasonable definition of compensation within the meaning of § 1.414(s)–1(d)(2). Thus, the definition of compensation from which contributions may be made is not required to satisfy the nondiscrimination requirement of § 1.414(s)–1(d)(3).

(v) *Restrictions due to limitations under the Internal Revenue Code.* A plan may limit the amount of contributions made by an eligible employee under a plan—

(A) Because of the limitations of section 402(g) or section 415; or

(B) Because, on account of a hardship distribution, an employee's ability to make contributions has been suspended for 6 months in accordance with § 1.401(k)–1(d)(3)(iv)(E).

(e) *Notice requirement.* A plan satisfies the notice requirement of this paragraph (e) if it satisfies the notice requirement of § 1.401(k)–3(d).

(f) *Plan year requirement*—(1) *General rule.* Except as provided in this paragraph (f) or in paragraph (g) of this section, a plan will fail to satisfy the requirements of section 401(m)(11) and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of that plan year and remain in effect for an entire 12-month plan year. Moreover, if, as described in paragraph (j)(4) of this section, safe harbor matching or nonelective contributions will be made to another plan for a plan year, provisions specifying that the safe harbor contributions will be made in the other plan and providing that the contributions will be QNECs or QMACs must be also be adopted before the first day of that plan year.

(2) *Initial plan year.* A newly established plan (other than a successor plan within the meaning of § 1.401(m)–2(c)(2)(iii)) will not be treated as violating the requirements of this paragraph (f) merely because the plan year is less than 12 months, provided that the plan year is at least 3 months long (or, in the case of a newly established employer that establishes the plan as soon as administratively feasible after the employer comes into existence, a shorter period). Similarly, a plan will not fail to satisfy the requirements of this paragraph (f) for the first plan year in which matching contributions are provided under the plan provided that—

(i) The plan is not a successor plan; and

(ii) The amendment providing for matching contributions is made effective at the same time as the adoption of a cash or deferred arrangement that satisfies the requirements of § 1.401(k)–3, taking into account the rules of § 1.401(k)–3(e)(2).

(3) *Change of plan year.* A plan that has a short plan year as a result of changing its plan year will not fail to satisfy the requirements of paragraph (f)(1) of this section merely because the plan year has less than 12 months, provided that—

(i) The plan satisfied the requirements of this section for the immediately preceding plan year; and

(ii) The plan satisfies the requirements of this section for the immediately following plan year.

(4) *Final plan year.* A plan that terminates during a plan year will not fail to satisfy the requirements of paragraph (f)(1) of this section merely because the final plan year is less than 12 months, provided that—

(i) The plan would satisfy the requirements of paragraph (h) of this section, treating the termination of the plan as a reduction or suspension of safe harbor matching contributions, other than the requirement that employees have a reasonable opportunity to change their cash or deferred elections and, if applicable, employee contribution elections; or

(ii) The plan termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship, comparable to a substantial business hardship described in section 412(d).

(g) *Plan amendments adopting nonelective safe harbor contributions.* Notwithstanding paragraph (f)(1) of this section, a plan that provides for the use of the current year testing method may be amended after the first day of the plan year and no later than 30 days before the last day of the plan year to adopt the safe harbor method of this section using nonelective contributions under paragraph (b) of this section if the plan satisfies the requirements of § 1.401(k)–3(f).

(h) *Permissible reduction or suspension of safe harbor matching contributions*—(1) *General rule.* A plan that provides for safe harbor matching contributions will not fail to satisfy the requirements of section 401(m)(2) for a plan year merely because the plan is amended during a plan year to reduce or suspend safe harbor matching contributions on future elective deferrals and, if applicable, employee contributions provided—

(i) All eligible employees are provided the supplemental notice in accordance with paragraph (h)(2) of this section;

(ii) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of 30 days after eligible employees are provided the notice described in paragraph (h)(2) of this section and the date the amendment is adopted;

(iii) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(iv) The plan is amended to provide that the ACP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in § 1.401(m)–2(a)(1)(ii); and

(v) The plan satisfies the requirements of this section (other than this paragraph (h)) with respect to amounts deferred through the effective date of the amendment.

(2) *Notice of suspension requirement.* The notice of suspension requirement of this paragraph (h)(2) is satisfied if each eligible employee is given a written notice that satisfies the content requirements of § 1.401(k)–3(e)(3).

(i) [Reserved]

(j) *Other rules*—(1) *Contributions taken into account.* A contribution is taken into account for purposes of this section for a plan year under the same rules as § 1.401(k)–3(h)(1).

(2) *Use of safe harbor nonelective contributions to satisfy other nondiscrimination tests.* A safe harbor nonelective contribution used to satisfy the nonelective contribution requirement under paragraph (b) of this section may also be taken into account for purposes of determining whether a plan satisfies section 401(a)(4) under the same rules as § 1.401(k)–3(h)(2).

(3) *Early participation rules.* Section 401(m)(5)(C) and § 1.401(m)–2(a)(1)(iii)(A) which provide an alternative nondiscrimination rule for certain plans that provide for early participation, does not apply for purposes of section 401(m)(11) and this section. Thus, a plan is not treated as satisfying this section with respect to the eligible employees who have not completed the minimum age and service

requirements of section 410(a)(1)(A) unless the plan satisfies the requirements of this section with respect to such eligible employees.

(4) *Satisfying safe harbor contribution requirement under another defined contribution plan.* Safe harbor matching or nonelective contributions may be made to another defined contribution plan under the same rules as § 1.401(k)–3(h)(4). Consequently, each NHCE under the plan providing for matching contributions must be eligible under the same conditions under the other defined contribution plan and the plan to which the contributions are made must have the same plan year as the plan providing for matching contributions.

(5) *Contributions used only once.* Safe harbor matching or nonelective contributions cannot be used to satisfy the requirements of this section with respect to more than one plan.

(6) *Plan must satisfy ACP with respect to employee contributions.* If the plan provides for employee contributions, in addition to satisfying the requirements of this section, it must also satisfy the ACP test of § 1.401(m)–2. See § 1.401(m)–2(a)(5)(iii) for specials rules under which the ACP test is permitted to be run taking into account only employee contributions when this section is satisfied with respect to the matching contributions.

§ 1.401(m)–4 Special rules for mergers, acquisitions and similar events. [Reserved]

§ 1.401(m)–5 Definitions.

Unless otherwise provided, the definitions of this section govern for purposes of section 401(m) and the regulations thereunder.

Actual contribution percentage (ACP). Actual contribution percentage or ACP means the ACP of the group of eligible employees as defined in § 1.401(m)–2(a)(2)(i).

Actual contribution percentage (ACP) test. Actual contribution percentage test or *ACP test* means the test described in § 1.401(m)–2(a)(1).

Actual contribution ratio (ACR). Actual contribution ratio or *ACR* means the ACR of an eligible employee as defined in § 1.401(m)–2(a)(3).

Actual deferral percentage (ADP) test. Actual deferral percentage test or *ADP test* means the test described in § 1.401(k)–2(a)(1).

Compensation. Compensation means compensation as defined in section 414(s) and § 1.414(s)–1. The period used to determine an employee's compensation for a plan year must be either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year. A plan may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year. *See also* section 401(a)(17) and § 1.401(a)(17)–1(c)(1). For this purpose, in case of an HCE whose ACR is determined under § 1.401(m)–2(a)(3)(ii), period of participation includes periods under another plan for which matching contributions or employee contributions are aggregated under § 1.401(m)–2(a)(3)(ii).

Current year testing method. Current year testing method means the testing method under which the applicable year is the current plan year, as described in § 1.401(m)–2(a)(2)(ii) or 1.401(k)–2(a)(2)(ii).

Elective contributions. Elective contributions means elective contributions as defined in § 1.401(k)–6.

Elective deferrals. Elective deferrals means elective deferrals described in section 402(g)(3).

Eligible employee—(1) *General rule. Eligible employee* means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (*e.g.*, formal application for participation or consent to payroll withholding) in order to be eligible to make an employee contribution for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs these acts.

(2) *Conditions on eligibility.* An employee who is unable to make employee contributions or to receive an allocation of matching contributions because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (*e.g.*, satisfy a minimum period of service requirement) in order to be eligible to make an employee contribution or to receive an allocation of matching contributions for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. An employee who would be eligible to make employee contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is treated as an eligible employee for purposes of section 401(m) for a plan year even though the employee may not make employee contributions or receive an allocation of matching contributions by reason of the suspension. Finally, an employee does not fail to be treated as an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1).

(3) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, upon commencing employment with the employer or upon the employee's first becoming eligible under any plan of the employer providing for employee or matching contributions, is given a one-time opportunity to elect, and the employee in fact does elect, not to be eligible to make employee contributions or to receive allocations of matching contributions under the plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. In no event is an election made after December 23, 1994, treated as one-time irrevocable election under this paragraph if the election is made by an employee who previously became eligible under another plan (whether or not terminated) of the employer.

Eligible HCE. Eligible HCE means an eligible employee who is an HCE.

Eligible NHCE. Eligible NHCE means an eligible employee who is not an HCE.

Employee. Employee means an employee within the meaning of § 1.410(b)–9.

Employee contributions. Employee contributions means employee contributions as defined in 1.401(m)–1(a)(3).

Employee stock ownership plan (ESOP). Employee stock ownership plan or *ESOP* means the portion of a plan that is an ESOP within the meaning of § 1.410(b)–7(c)(2).

Employer. Employer means an employer within the meaning of § 1.410(b)–9.

Excess aggregate contributions. Excess aggregate contributions means, with respect to a plan year, the amount of excess aggregate contributions apportioned to an HCE under § 1.401(m)–2(b)(2)(iii).

Excess contributions. Excess contribution means with respect to a plan year, the amount of excess contribution apportioned to an HCE under § 1.401(k)–2(b)(2)(iii).

Excess deferrals. Excess deferrals means excess deferrals as defined in § 1.402(g)–1(e)(3).

Highly compensated employee (HCE). Highly compensated employee or *HCE* has the meaning provided in section 414(q).

Matching contributions. Matching contribution is defined in § 1.401(m)–1(a)(2).

Nonelective contributions. Nonelective contributions means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

Non-employee stock ownership plan (non-ESOP). Non-employee stock ownership plan or *non-ESOP* means the portion of a plan that is not an ESOP within the meaning of § 1.410(b)–7(c)(2).

Non-highly compensated employee (NHCE). Non-highly compensated employee or *NHCE* means an employee who is not an HCE.

Plan. Plan means plan as defined in § 1.401(m)–1(b)(4).

Prior year testing method. Prior year testing method means the testing method under which the applicable year is the prior plan year, as described in § 1.401(m)–2(a)(2)(ii) or § 1.401(k)–2(a)(2)(ii).

Qualified matching contributions (QMAC). Qualified matching contributions or *QMAC* means matching contributions that satisfy the requirements of § 1.401(k)–1(c) and (d) at the time the contribution is made, without regard to whether the contributions are actually taken into account as elective contributions under § 1.401(k)–2(a)(6). See also § 1.401(k)–2(b)(4)(iii) for a rule providing that a matching contribution does not fail to qualify as a QMAC solely because it is forfeitable under section 411(a)(3)(G) because it is a matching contribution with respect to an excess deferral, excess contribution, or excess aggregate contribution.

Qualified nonelective contributions (QNEC). Qualified nonelective contributions or *QNEC* means employer contributions, other than elective contributions or matching contributions, that satisfy the requirements of § 1.401(k)–1(c) and (d) at the time the contribution is made, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ADP test under § 1.401(m)–2(a)(6).

Judith B. Tomaso,

Acting Deputy Commissioner for Services and Enforcement.

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Part III

Department of Commerce

Bureau of the Census

15 CFR Part 30

Automated Export System Mandatory Filing for Items on the Commerce Control List (CCL) and the United States Munitions List (USML) that Currently Require a Shipper's Export Declaration (SED); Final Rule

DEPARTMENT OF COMMERCE

Bureau of the Census

15 CFR Part 30

[Docket Number 010622161–3092–03]

RIN 0607–AA34

Automated Export System Mandatory Filing for Items on the Commerce Control List (CCL) and the United States Munitions List (USML) That Currently Require a Shipper's Export Declaration (SED)

AGENCY: Bureau of the Census, Commerce.

ACTION: Final rule.

SUMMARY: The U.S. Census Bureau (Census Bureau) is amending the Foreign Trade Statistics Regulations (FTSR) to incorporate requirements for the mandatory Automated Export System (AES)/AES*Direct* filing for items identified on the Department of Commerce's Commerce Control List (CCL) and the Department of State's United States Munitions List (USML). The AES is the electronic method to file the paper Shipper's Export Declaration (SED) and the ocean manifest information directly with the Bureau of Customs and Border Protection (CBP). AES*Direct* is the Census Bureau's free Internet-based system for filing SED information with the CBP's AES. Further references to AES covers both AES and AES*Direct*. You are only required to file information via AES for those CCL and USML items that require an SED. This rule will, among other things, provide provisions for AES mandatory filing in the FTSR.

DATES: *Effective Date:* This rule is effective August 18, 2003.

Implementation Date: The Census Bureau will implement provisions of this rule on October 18, 2003. This will allow all affected entities sufficient time to come into compliance with this rule.

FOR FURTHER INFORMATION CONTACT: C. Harvey Monk, Jr., Chief, Foreign Trade Division, U.S. Census Bureau, Room 2104, Federal Building 3, Washington, DC 20233–6700, (301) 763–2255, by fax (301) 457–2645, or by e-mail: *c.harvey.monk.jr@census.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau is responsible for collecting, compiling, and publishing trade statistics for the United States under the provisions of Title 13, United States Code (U.S.C.), chapter 9, section 301. The paper SED and the AES are the primary media used for collecting such trade data, and the information contained therein is used by the Census Bureau for statistical purposes only. This information is exempt from public disclosure under the provisions of Title 13, U.S.C., chapter 9, section 301(g). The SED and AES records also are used for export control purposes under Title 50, U.S.C., and Title 22, U.S.C., to detect and prevent the export of certain critical technology and commodities to unauthorized destinations or end users and to ensure compliance with export control laws and regulations under the authority of the Department of State.

Under the current rules and regulations, export information is compiled from both paper and electronic transactions filed by the export community with CBP and the Census Bureau. The AES is an electronic method by which the U.S. principal party in interest (USPPI) or the authorized agent can transmit the required export information. For purposes of completing the SED or AES record, the USPPI is the person in the United States that receives the primary benefit, monetary or otherwise, from the export transaction. The authorized agent is the person in the United States who is authorized by power of attorney or written authorization by the USPPI or the foreign principal party in interest to prepare and file the SED or AES record. A paper SED or the electronic equivalent AES record is required, with certain exceptions, for exports of merchandise valued at more than $2,500 from the United States, Puerto Rico, and the U.S. Virgin Islands to foreign countries or exports between the U.S. Virgin Islands and Puerto Rico and the United States. The SED or AES record also is required for all exports under a Bureau of Industry and Security (BIS) or Department of State (State Department) export license or State Department license exemption, regardless of value, unless exempted from the requirement for an SED or AES record by the State Department (see 15 CFR, part 30, § 30.55(h)(2) and 22 CFR parts 120–130).

For export data filed via a paper SED, the USPPI or freight forwarder must present the SED to the exporting carrier when the cargo is tendered to the carrier. The vessel, air, or rail carrier must present the manifest and supporting documentation to the CBP Port Director at the port of export within four days after departure if a bond is posted with CBP. However, this rule does not apply to SEDs or AES shipments subject to BIS or State Department licenses or State Department license exemptions. If the information is filed in the AES, an exemption legend is included on the vessel, air, or rail manifest, or other commercial loading documents indicating that no SED is attached, with a transaction identification number or unique identifier to identify the electronic AES record. If no manifest is required or the manifest is electronically filed, the paper SEDs or the electronically filed AES exemption legends are presented directly to CBP.

Electronic filing strengthens the U.S. Government's ability to control the export of critical goods and technologies and weapons of mass destruction to prohibited and unauthorized end-users and affords the government the ability to significantly improve the quality, timeliness, and coverage of export statistics. Currently, fifty (50) percent of the paper SEDs submitted contain one or more errors in export reporting, accounting for a significant percentage of unreported exports. Reporting on the AES has demonstrated that, compared to paper filing, the error rate is reduced substantially and coverage is improved. Currently, the error rate for export transactions filed through the AES is approximately six (6) percent. At this time, the electronic AES filing of the required export information under Title 13, U.S.C., Section 301, is strictly voluntary for the export of most items.

On November 29, 1999, the President signed H.R. 3194, the Consolidated Appropriations Act of 1999, into law (Pub. L. 106–113). Section 1252(a) of this law, amends Title 13, U.S.C., chapter 9, section 301, to add subsection ''(h)'' authorizing the Secretary of Commerce to require by regulation, mandatory reporting requirements for filing export information through the AES for items identified on the CCL and USML that require the SED. The effective date of this amendment was 270 days after the Secretary of Commerce, the Secretary of the Treasury, and the Director of the National Institute of Standards and Technology jointly provided a certification to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the U.S. House of Representatives that a secure AES mainframe computer system of CBP and the Internet-based AES*Direct* system of the Census Bureau was capable of handling the expected volume of information required to be filed, plus the anticipated volume from voluntary use of the AES, and AES had been successfully implemented and tested and was fully functional with respect to reporting all items on the CCL and USML, including quantities and destinations. The required certification report was submitted to Congress in June 2001. The certification report

described the security measures in place to develop, implement, and maintain each system; summarized the information system assessment reports prepared by the General Services Administration, Office of Information Security, and CBP; and provided the Census Bureau's response to those security assessment reports listing the specific actions taken by both agencies to ensure the security and functionality of the system. In addition, the AES received a security accreditation from CBP, and the AES*Direct* system received a security accreditation from the Census Bureau. On July 26, 2001, the Census Bureau published a program notice in the **Federal Register** (66 FR 39006) announcing that the AES certification report was submitted to Congress, and that the Census Bureau would be issuing rules, and allowing the public to comment, on this subject.

As authorized by section 1252(b) of Pub. L. 106–113, the Census Bureau is amending the FTSR to specify the mandatory provisions for electronically filing SEDs as well as the time and place requirements for filing. In addition, the Census Bureau is amending the FTSR to specify: (1) The requirements for the filing of SEDs through the electronic AES and the provisions and responsibilities of parties exporting items identified on the CCL and USML via the AES; (2) the provision by the Department of Commerce for the establishment of on-line assistance services to be available for those individuals who must use the AES; (3) the provision by the Department of Commerce for ensuring that an individual required to use the AES is able to print out from the AES a validated record of the individual's submission, including the date of submission and a transaction number or unique identifier, where appropriate, for the export transaction; and (4) a requirement that the Department of Commerce print out and maintain on file a paper copy or other acceptable back-up record of the individual's submission at a location selected by the Secretary of Commerce.

The Census Bureau is amending the FTSR to specify how electronic export information is identified on the manifest by mode of transportation and defining the carrier's responsibilities. In addition to amending regulations to provide for the mandatory filing via the AES, this rule amends §§ 30.63 (14)–(21) to collect additional data through the AES to meet the State Department's requirements and will assist the Department of State to implement the Congressional requirement in section 38(i) of the Arms Export Control Act, Title 22 U.S.C., section 2778(i) for U.S. persons to provide to the Department of State a report containing all shipment information of items controlled under the International Traffic in Arms Regulations (ITAR), 22 CFR parts 120–130. Finally, this rule adds to the paper SED the requirement to enter the freight forwarder's Employer Identification Number (EIN) when required. This requirement applies to filers who are not required to file through AES and who choose to file a paper SED, rather than filing voluntarily through AES.

One additional revision the Census Bureau is making to the FTSR is the removal of AES Filing Option 3. Option 3 allowed the filer to provide partial predeparture information and complete information five (5) working days from the date of exportation. The Census Bureau identified four (4) specific reasons for eliminating Option 3. Option 3 has shown to be underutilized by the AES filers. Of the 734,916 total average AES shipment transactions collected per month, Option 3 filings averaged only 28,739 or 3.9 percent. Additionally, of the 5,000 plus AES filers, only 53 filers used Option 3 and of those, only seven (7) used Option 3 exclusively. The data collected were often incomplete and inaccurate because of missing postdeparture filings. Lastly, Option 3 has shown to be a burden by requiring filers to transmit twice for one shipment.

The Census Bureau published a proposed rulemaking and request for comments in the **Federal Register** on October 9, 2002 (67 FR 62911). As previously noted, the Census Bureau also published a program notice on the subject (66 FR 39006) on July 26, 2001. A summary of comments received from the export trade community and the Census Bureau's responses to the comments are presented in this rule. The effective date of this rule is August 18, 2003. The Census Bureau will implement provisions of this rule on October 18, 2003. This will allow all affected entities sufficient time to come into compliance with this rule.

Response to Comments

The Census Bureau received 14 letters commenting on the Notice of Proposed Rulemaking (NPR) published in the **Federal Register** on October 9, 2002 (67 FR 62911). Nine of the letters contained comments on two or more issues. The Census Bureau sent letters to all commentors addressing their concerns. After consideration of the comments received, the Census Bureau revised certain provisions in the final rule to address the concerns of the commentors and to clarify the requirements of the rule. The major concerns were as follows:

1. *Clarify the future status of postdeparture filing utilizing AES Option 4 or another form of postdeparture reporting.* There is concern among commentors that the Census Bureau will discontinue allowing postdeparture filing for data on export transactions reported through the AES. This is not the case. The Census Bureau does not intend to eliminate Option 4 postdeparture filing. We intend to eliminate only Option 3 filing, a hybrid pre- and postdeparture filing procedure. For reasons given in the NPR, AES Option 3 is underutilized by AES filers, and its use has resulted in incomplete and inaccurate data filing. Only seven (7) companies, representing less than four (4) percent of monthly export trade data transactions, used Option 3 exclusively to file data on export shipments. By requiring filers to transmit partial predeparture information initially and complete information after exportation, Option 3 has been a burden to AES filers.

Other commentors are in favor of eliminating Option 3 filing only if the Census Bureau makes a commitment to maintaining Option 4 or some form of postdeparture filing. Several commentors requested that the Census Bureau, in its final decision, emphasize the importance of retaining Option 4 filing in light of various governmental initiatives that are intended to capture information on export shipments as early as possible.

The Census Bureau supports postdeparture filing through AES because it recognizes that some trade community business practices may preclude predeparture filings. AES Option 4 filing considers the trade community's business practices and also provides for an approval process that ensures that only the most compliant companies are approved. While it is possible that Option 4 filing may undergo modifications due to current or future Census Bureau or other government agency initiatives, the Census Bureau will continue to work closely with its counterparts in other agencies to make available to the exporting community some form of postdeparture filing. In the case of ITAR controlled exports, the Department of State has determined that because of law enforcement as well as national security concerns, it will no longer authorize the use of AES Option 4.

2. *Amend the proposed rule to address time and place for presenting the exemption statements to carriers.* Commentors are concerned that USPPIs and authorized freight forwarders may

not always be able to present exemption information to exporting carriers at the time cargo is first tendered to the exporting carrier, especially when the carrier assumes responsibility for cargo at an inland port and provides intermodal transportation to the port of exportation. In some situations, the USPPI or forwarding agent may not have produced export documentation on which exemption information is required to be shown, at the time goods are tendered to the first carrier.

The Census Bureau agrees that the USPPI or its authorized agent does not always have exemption information available to provide to the carrier when cargo is initially tendered to a carrier for export. This is especially true in cases where the USPPI or agent arranges transportation that involves more than one carrier. The intent of § 30.12(d) of the FTSR is to require AES filers to deliver exemption information to the *exporting carrier.* To clarify the intent of this section, the Census Bureau is amending § 30.12(d) to emphasize that the USPPI or forwarding agent is required to deliver the AES exemption legend to the exporting carrier, that is, the carrier that will transport the goods to the foreign country.

3. *Clarify filing responsibilities of the USPPI and its authorized freight forwarder.* Commentors are concerned about the documentation responsibilities of the USPPI and the authorized forwarding agent in reporting information on export transactions. Responsibilities of the USPPI and authorized agent, including those involving routed export transactions, are specifically described in sections 30.4(b) and (c) of the FTSR. The Census Bureau does not intend to imply that any provision of section 30.4 is being revised by amending any other section of Title 15, Code of Federal Regulations, part 30 (the FTSR).

Two commentors proposed the institution of a joint filing system to be used by the USPPI and the authorized agent as a means to reduce liability on the parties and to alleviate the dependency of each party on the other to file complete data on export transactions. The Census Bureau considered establishing a method of filing export information that would allow the USPPI and the authorized forwarding agent to submit information jointly to CBP via the AES. However, the Census Bureau did not go forward with this filing option because of the cost of implementation and the potential risks associated with matching information from two different parties.

4. *Explain the need for reporting additional address information for the USPPI.* Several commentors expressed concern that by amending § 30.7(d)(3) of the FTSR, the Census Bureau is requiring additional address information from the USPPI. Some commentors indicated that the new address requirement would be difficult to comply with because of the lack of information on the origin of shipments for multiunit establishments. Many commentors also questioned the reason for the amendment. In amending § 30.7(d)(3) of the FTSR, the Census Bureau is not requiring an additional address for the USPPI, but is merely defining the address required for the USPPI as the location where the goods began their journey to the port of export. For shipments handled by freight forwarders, it is the responsibility of the USPPI to provide forwarding agents addresses that reflect the origin of goods for export reporting purposes.

The address should correspond to the two-digit state code reported for the state of origin. However, the Census Bureau requires the entire address, including ZIP Code, to develop and compile substate data or metropolitan area export data to replace the discontinued exporter location series. Substate data are used by local and State governments, among other parties, to gauge the impact of trade legislation on the economy of local jurisdictions as well as to monitor local area trade development programs. Since about 90 percent of AES transactions currently have transaction-level addresses reported, the Census Bureau does not expect to add significantly to the reporting burden of AES filers with this requirement.

5. *Amend the proposed rule requiring reporting of the Transportation Reference Number (TRN) to reflect current trade practices.* Commentors are concerned that filers of export data will not have the information to comply, in a timely manner, with the requirements of §§ 30.7(j) and 30.63(b)(11) of the FTSR, specifically for shipments sent by air and truck. After consideration of comments received concerning reporting of the TRN, the Census Bureau has determined that documents specified in the NPR, namely, the master air waybill for air shipments, the bill of lading for rail shipments, and the Freight or Pro Bill for truck shipments, are not usually available to the USPPI or the authorized agent at the time cargo is given to air, rail, and truck carriers. Currently, the TRN is a conditional field in the AES except for shipments made by vessel where the information is required. The Census Bureau has made the TRN an optional reporting requirement for other than vessel shipments filed through the AES or via the SED. The Census Bureau amended language contained in §§ 30.7(j) and 30.63 (c) of the FTSR to reflect these revisions.

6. *Clarify the responsibilities of exporting carriers relative to presentation of the exemption legend to the CBP.* Several commentors indicated concern about the proposed language in FTSR §§ 30.21, 30.22, and 30.65 regarding requirements for annotating and transmitting exemption statements for export shipments and filing of manifests by exporting carriers. Some commentors think that the language could imply responsibility on the part of exporting carriers for properly annotating the exemption legend. This is not the case. The USPPI or the authorized agent is responsible for properly annotating the exemption legend.

Further, there is concern that references to carriers exempt from filing manifests as detailed in § 30.21(f) of the regulations do not include carriers for all modes of transportation. It is not the Census Bureau's intent to institute a change in carrier responsibility with regard to the annotation and presentation of proof of filing citations or exemption legends for shipments filed through the AES or shipments for which SEDs are not required. When required, it is the responsibility of the USPPI or the authorized agent to provide the exemption legend or proof of filing citation on bills of lading, air waybills or other commercial loading documents for presentation to the carrier prior to export.

The Census Bureau does not propose to hold exporting carriers liable for the content of exemption legends presented by USPPIs or authorized agents for transactions reported through the AES or by way of the paper SED. The Census Bureau is revising the language contained in § 30.22(a) and (b) and § 30.65(b) of the FTSR to clarify the responsibility of exporting carriers with regard to the content and submission of exemption legends. The Census Bureau also is revising the language contained in § 30.21(4) to include references to all modes of transportation exempt from filing manifests with the CBP.

Also, commentors expressed concern about the lack of availability of the International Traffic in Arms Regulations (ITAR) applicable to shipments filed through the AES and mentioned in these and other sections of the FTSR. The State Department will issue a final rule concerning time of filing and proof of filing citations prior to the Census Bureau's implementation of the final rule.

7. *Clarify the role of Data Entry Centers (DECs) in filing for CCL and USML export shipments.* Some commentors are concerned about the role of DECs in handling shipments on the CCL and USML subsequent to issuance of this rule. Currently, DECs may transmit through the AES export information submitted by a USPPI or authorized agent, including items identified on the CCL or USML lists. With issuance of this rule, only the USPPI or its authorized agent may file information on CCL or USML shipments through AES. Companies acting as DECs may transmit CCL and USML information through the AES if: (1) The reports are prepared by the USPPI or its authorized agent, or (2) the DEC becomes an authorized agent for the USPPI, with a properly executed power of attorney. The DEC cannot be the filer. The decision to transmit or not to transmit information on CCL or USML shipments through the AES is made solely by the DEC. Only companies acting as authorized agents of the USPPI with a properly executed power of attorney or written authorization are permitted to modify or amend information provided by the USPPI either before or following transmission through the AES.

Changes to the Proposed Rule as a Result of Public Comments

The changes made in this final rule to what has been included in the proposed rule are as follows:

(1) Section 30.7(j) is amended to require reporting of the TRN optional for shipments exported by modes of transportation other than vessel. This change is in response to concerns addressed in Item No. 5 of the ''Response to Comments'' section.

(2) Section 30.12(d) is amended to specify the proper carrier to which the USPPI or the authorized agent is to present the exemption legend or proof of filing citation for shipments filed through the AES. This change is in response to concerns addressed in Item No. 2 in the ''Response to Comments'' section.

(3) Section 30.21(4) is amended to clarify the types of carriers excluded from filing manifests with CBP and to stipulate the conditions under which operators of these carriers are required to present exemption legends or filing citations to CBP. This change is in response to concerns addressed in Item No. 6 in the ''Response to Comments'' section.

(4) Sections 30.22(a) and (b) are amended to clarify language describing the exporting carrier's responsibility for transmitting the exemption legend or proof of filing citation to CBP when an SED is not required because data on an export transaction are filed through the AES. This change is in response to concerns addressed in Item No. 6 in the ''Response to Comments'' section.

(5) Section 30.22(f) is amended to limit the application of paragraph (f) to items identified on the Department of Commerce's CCL and the State Department's USML. This change is in response to concerns addressed in Item No. 6 in the ''Response to Comments'' section.

(6) Section 30.63(c) is amended by making reporting of the TRN optional for other than vessel shipments in § 30.63(c). This change is in response to concerns addressed in Item No. 5 in the ''Response to Comments'' section.

(7) Section 30.65(b) is amended to clarify the exporting carrier's responsibility for transmitting the exemption legend or proof of filing citation to CBP for data on export transactions filed through the AES. This change is in response to concerns addressed in Item No. 6 in the ''Response to Comments'' section.

Program Requirements

In order to comply with the requirements of Pub. L. 106–113, requiring AES mandatory filing for items on the Department of Commerce's CCL and the State Department's USML, the Census Bureau is amending the appropriate sections of the FTSR to specify the requirements for the AES mandatory filing and the revision to the paper SED. For purposes of this rule, all references to filing mandatory AES shipments are limited to those kinds of shipments and do not apply to shipments that may be reported on the paper SED.

The Census Bureau is revising the following sections of the FTSR:

- Section 30.1 to specify the general requirements for filing, via the AES, items identified on the CCL and USML that would otherwise require the filing of an SED;
- Section 30.7 to add instructions for filing the address of the USPPI, the freight forwarder's EIN on the paper SED, the transportation reference number, instructions for filing the gross shipping weight for air, vessel, truck, and rail modes of transportation via paper and the AES and delete references to ''marks and numbers'';
- Section 30.12 to specify the instructions regarding the time and place for presenting SED information;
- Section 30.21 to specify the departing carrier's responsibility for filing export and manifest data via paper and/or the AES, as appropriate;
- Section 30.22 to specify the responsibilities of the departing carrier to deliver to the CBP Port Director, at the time of exportation, the required documentation for electronically filed items;
- Section 30.23 to amend the requirements for the pipeline carrier when the item is identified on the CCL or USML;
- Section 30.60 is amended to specify participation requirements in the AES;
- Section 30.61 to specify the electronic filing options required for mandatory filing and to delete references to Option 3;
- Section 30.62 is amended to update the specifications for certification, qualification, and standards for AES and AES *Direct;*
- Section 30.63 to revise the requirements for entering a USPPI's profile in AES and to add data elements required in the AES to validate State Department's Directorate of Defense Trade Controls (DDTC) licensed or license-exempt shipments and to remove references to Option 3;
- Section 30.65 to specify the requirements for annotating the proper exemption legends when exports are filed through the AES;
- Section 30.66 to specify requirements as stated in section 1252(b)(2) of Pub. L. 106–113, which pertains to recordkeeping and documentation requirements;
- Revise Appendix A to amend the instructions for the Letter of Intent;
- Revise Appendix B to delete references to Option 3 filing and to reserve it for future use; and
- Revise Appendix C to clarify export information codes, license codes, and in-bond codes.

The collection of additional data items listed in Appendix C has been approved by the Office of Management and Budget (OMB). In addition, the Census Bureau is also making the minor revisions discussed previously in the section entitled, ''Changes to the Proposed Rule as a Result of Public Comments.''

The State Department and the Department of Homeland Security concur with the provisions contained in this rule.

Rulemaking Requirements

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant impact on a substantial number of small entities. The factual basis for this

certification was published in the proposed rule. No comments were received regarding the economic impact of this rule. As a result, no final regulatory flexibility analysis was prepared.

Executive Orders

This rule has been determined to be not significant for purposes of Executive Order 12866. It has been determined that this rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a current, valid OMB control number. In accordance with the PRA, 44 U.S.C., Chapter 35, OMB approved on April 26, 2002, with control number 0607–0512, the collection of all information associated with the AES and SED under this rule. We estimate that each electronic SED will take approximately 3 minutes to complete; we estimate that each paper SED will take approximately 11 minutes to complete.

List of Subjects in 15 CFR Part 30

Economic statistics, Foreign trade, Exports, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, 15 CFR part 30 is amended as follows:

PART 30—FOREIGN TRADE STATISTICS

■ 1. Revise the authority citation for part 30 to read as follows:

Authority: 5 U.S.C. 301; 13 U.S.C. 301–307; Reorganization Plan No. 5 of 1950 (3 CFR 1949–1953 Comp., 1004); and Department of Commerce Organization Order No. 35–2A, July 22, 1987, as amended.

■ 2. In Part 30, revise all references to the ''Bureau of Export Administration'' to read the ''Bureau of Industry and Security,'' and revise all reference to ''BXA'' to read ''BIS.'' Also, revise all references to the ''U.S. Customs Service'' to read the ''Bureau of Customs and Border Protection,'' and revise all references to ''Customs'' to read ''CBP.''

■ 3. Revise the heading of subpart A to read as follows:

Subpart A—General Requirements—U.S. Principal Party In Interest (USPPI)

■ 4. Amend § 30.1 as follows:

■ a. Revise all references to ''exporters or their agents'' to read ''U.S. principal party in interest or the authorized agent'' in paragraph (a).

■ b. Revise paragraph (b).

■ c. Revise paragraph (c).

The revisions read as follows:

§ 30.1 General Statement of requirement for Shipper's Export Declarations (SEDs).

* * * * *

(b) SEDs shall be filed for merchandise moving as described above regardless of the method of transportation. Instructions for the filing of SEDs for vessels, aircraft, railway cars, etc., when sold foreign appear in § 30.33. Export information that is required to be filed for items identified on the Commerce Control List (CCL) of the Export Administration Regulations (EAR) (15 CFR Supplement No. 1 to part 774) or the State Department's U.S. Munitions List (USML) of the International Traffic in Arms Regulations (ITAR) (22 CFR, part 121) is to be filed electronically through AES. This requirement to file information via AES applies to those items that would otherwise require the filing of an SED. Exemptions from these requirements and exceptions to some of the provisions of these regulations for particular types of transactions are found in subparts C and D of this part.

(c) In lieu of filing paper SEDs as provided elsewhere in this Section, when an SED would be required, the USPPI or the authorized agent is required to file shippers' export information, when required, electronically through the AES for the export of items identified on the CCL of the EAR (15 CFR Supp. No. 1 to Part 774) or the USML of the ITAR (22 CFR, part 121) as provided for in subpart E of this part, Electronic Filing Requirement-Shipper's Export Information. Information for items identified on the USML, including those exported under an export license exemption, must be filed electronically prior to export, unless exempted from the SED filing requirement by the State Department. For USML shipments, refer to the ITAR (22 CFR, parts 120–130) for requirements concerning the AES proof of filing citation and filing time requirements. The USPPI or the authorized agent filing SEDs for the export of items not on the CCL or the USML has the option of filing this information electronically as provided for in subpart E of this part.

■ 5. Amend Section 30.7 as follows:

■ a. Add paragraph (d)(3).

■ b. Revise the first sentence of paragraph (e).

■ c. Revise paragraph (j).

■ d. Remove and reserve paragraph (k).

■ e. Add a sentence after the second sentence in paragraph (l).

■ f. Revise paragraph (o).

The additions and revisions read as follows:

§ 30.7 Information required on Shipper's Export Declaration.

* * * * *

(d) * * *

(3) Address (number, street, city, state, Zip Code) of the USPPI. In all export transactions, the USPPI shall report the address location from which the merchandise actually starts its journey to the port of export. For example, an SED covering merchandise laden aboard a truck at a warehouse in Georgia for transport to Florida for loading onto a vessel for export to a foreign country shall show the address of the warehouse in Georgia. If the USPPI does not have a facility (processing plant, warehouse, distribution center, or retail outlet, etc.) at the location from which the goods began their export journey, report the USPPI address from which the export was directed. For shipments of multiple origins reported on a single SED, report the address from which the greatest value begins its export journey or, if such information is not known at the time of export, the address from which the export is directed.

(e) *Forwarding or other agent.* The name, address, and EIN or Social Security Number (SSN) of the duly authorized forwarding or other agent (if any) of a principal party in interest must be recorded where required on the SED or AES record. * * *

* * * * * *

(j) *Transportation Reference Number.* Enter the Transportation Reference Number as follows:

(1) *Vessel Shipments.* Report the booking number for all sea shipments. The booking number is the reservation number assigned by the carrier to hold space on the vessel for cargo being exported. This number is required to be reported for all vessel shipments.

(2) *Air Shipments.* Report the master air waybill number for all air shipments. The air waybill number is the reservation number assigned by the carrier to hold space on the airplane for cargo being exported. The reporting of this number is optional.

(3) *Rail Shipments.* Report the bill of lading (BOL) number for all rail shipments. The BOL number is the reservation number assigned by the carrier to hold space on the rail car for cargo being exported. The reporting of this number is optional.

(4) *Truck Shipments.* Report the Freight or Pro Bill number for all truck shipments. The Freight or Pro Bill number is the number assigned by the carrier to hold space on the truck for cargo being exported. The Freight or Pro Bill number correlates to a bill of lading number, air waybill number or Trip number for multi-modal shipments. The reporting of this number is optional.

(k) [Reserved]

(l) * * * Include marks, numbers, or other identification shown on packages and the number and kinds of packages (*i.e.*, boxes, barrels, baskets, bales, etc.). * * *

(o) *Gross (shipping) weight.* Enter the gross shipping weight in kilograms on the SED or the AES record, including the weight of containers, for air, vessel, truck, and rail methods of transportation. However, for containerized cargo in lift vans, cargo vans, or similar substantial outer containers, the weight of such containers should not be included in the gross weight of the commodities. If the gross shipping weight information is not available for individual Schedule B items because commodities covered by more than one Schedule B number are contained in the same shipping container, approximate shipping weights should be used for each Schedule B item in the container. The total estimated weights must equal the actual shipping weight of the entire container or containers and contents.

* * * * *

■ 6. Revise § 30.12 to read as follows:

§ 30.12 Time and Place for Presenting the SED, Exemption Legends or Proof of Filing Citations.

The following conditions govern the time and place to present paper SEDs, exemption legends, or proof of filing citations. It is the duty of the USPPI or the authorized agent to deliver the required number of copies of the SED, the exemption legends, or the proof of filing citations when the cargo is tendered to the exporting carrier. Information on items identified on the CCL of the EAR (15 CFR Supp. No. 1 to Part 774) or the USML of the ITAR (22 CFR part 121) that would otherwise require the filing of an SED, must be filed through the AES. Information for items identified on the USML, including those exported under an export license exemption, must be filed electronically prior to export, unless exempted from the SED filing requirements by the State Department. For State Department USML shipments, refer to the ITAR (22 CFR parts 120–130) for more specific requirements concerning the AES proof of filing citation and filing time. Failure of the USPPI or the authorized agent of either the USPPI or foreign principal party in interest to comply with these requirements constitutes a violation of the provisions of these regulations, and renders such principal party or the authorized agent subject to the penalties provided for in § 30.95 of this part.

(a) *Postal Exports.* SEDs for exports of items being sent by mail, as required in § 30.1 of this part, shall be presented to the postmaster with the packages at the time of mailing.

(b) *Pipeline Exports.* SEDs for exports being sent by pipeline are not required to be presented prior to exportation; however, they are required to be filed within four (4) working days after the end of each calendar month. These SEDs must be filed with the CBP Port Director having jurisdiction for the pipeline, and the filer must deliver the SED in the number of copies specified in § 30.5 of this part to cover exports to each consignee during the calendar month.

(c) *Exports by other methods of transportation.* For exports sent other than by mail or pipeline, the required number of copies of SEDs as prescribed in § 30.5 of this part shall be delivered to the exporting carrier when the cargo is tendered to the exporting carrier.

(d) *Exports Filed Via AES.* For exports filed through the AES, it is the duty of the USPPI or the authorized agent to deliver to the exporting carrier, the AES exemption legends as provided for in § 30.65 of this part or the AES proof of filing citation as provided for in 22 CFR (parts 120–130) of the ITAR when the cargo is tendered to the exporting carrier for transport to the foreign country.

Subpart B—General Requirements—Exporting Carriers

■ 7. Revise § 30.21 to read as follows:

§ 30.21 Requirements for the filing of manifests.

Carriers transporting merchandise via vessel, aircraft, or rail are required to file an outbound manifest (along with the required SEDs, supporting documentation and/or the exemption statement or the proof of filing citation) to the CBP Port Director at the port of exportation. Outbound vessel manifests may be filed via paper or electronically through the vessel transportation module, a component of the AES, as provided in CBP Regulations, 19 CFR, §§ 4.63 and 4.76. SEDs may be filed via paper or electronically via the AES.

(a) *Paper SED—paper manifest.* If filing paper SEDs and paper manifest, attach the copies of the SEDs to the manifest. For each item of cargo transported via vessel, the Transportation Reference Number on the SED covering the item must be shown on the manifest.

(b) *Paper SED—electronic manifest.* If filing paper SEDs and the electronic outbound vessel manifest, carriers are responsible for submitting paper SEDs directly to the CBP Port Director.

(c) *Electronic SED (AES)—paper manifest.* If filing the SED information electronically (AES) and paper outbound manifest, carriers must annotate the outbound manifest with the appropriate AES exemption legends as provided in § 30.65 of this part.

(d) *Electronic SED (AES) and manifest.* If filing the SED information and outbound vessel manifest electronically through the AES, the carrier must adhere to the instructions specified in CBP Regulations (19 CFR, § 4.76) and § 30.60 of this part and transmit the appropriate AES proof of filing citation as provided in § 30.65 of this part.

(e) *When an SED is not required.* If an item does not require the filing of an SED, the appropriate exemption legends must be annotated on the outbound manifest or other appropriate commercial documents as provided in § 30.50 of this part.

(f) *Exports to Puerto Rico.* When filing paper manifests for shipments from the United States to Puerto Rico, the manifest shall be filed with the CBP Port Director where the merchandise is unladen in Puerto Rico.

(1) *Vessels.* Vessels transporting merchandise as specified in § 30.20 of this part (except vessels exempted by paragraph (f)(4) of this section) shall file a complete Cargo Declaration Outward With Commercial Forms, CBP Form 1302–A. In addition, vessel carriers are required to perform the following:

(i) *Bunker fuel.* The manifest for vessels (including vessels carrying bunker fuel to be laden aboard vessels on the high seas) clearing for foreign countries shall show quantities and values of bunker fuel taken aboard at that port for fueling use of the vessel, apart from such quantities as may have been laden on vessels as cargo.

(ii) *Coal and Fuel Oil.* The quantity of coal shall be reported in metric tons (2240 pounds), and the quantity of fuel oil shall be reported in barrels of 158.98 liters (42 gallons). Fuel oil shall be described in such manner as to identify diesel oil as distinguished from other types of fuel oil.

(2) *Aircraft.* Aircraft transporting merchandise as specified in § 30.20 of this part, shall file a complete manifest on CBP Form 7509, as required in CBP Regulations, 19 CFR 122.72 through

122.76. All the cargo so laden shall be listed and shall show, for each item, the air waybill number or marks and numbers on packages, the number of packages, and the description of the goods.

(3) *Rail carriers.* Rail carriers transporting merchandise as specified in § 30.20 of this part shall file a car manifest. Such manifest shall be filed with the CBP Port Director at the port of exportation, giving the marks and numbers, the name of the shipper or consignor, description of goods and the destination thereof. The manifest may be a waybill, or copy thereof, or a copy of the manifest prepared for foreign customers.

(4) *Carriers not required to file manifests.* Carriers exempted from filing manifests are required, upon request, to present to the CBP Port Director the proof of filing citations, SED exemption legends, or AES exemption legends for each shipment. Failure of the carrier to do so constitutes a violation of the provisions of these regulations, and renders such carrier subject to the penalties provided for in § 30.95 of this part.

■ 8. Amend § 30.22 as follows:
■ a. Revise the heading of § 30.22.
■ b. Add two sentences to the end of paragraph (a).
■ c. Add two sentences after the first sentence in paragraph (b).
■ d. Add paragraph (f).

The additions and revision read as follows:

§ 30.22 Requirements for the filing of SEDs or AES exemption legends and AES proof of filing citations by departing carriers.

(a) * * * When the export information for a shipment is filed electronically via the AES, the carrier is responsible for transmitting the appropriate AES exemption legend as provided in § 30.65 of this part and the AES proof of filing citation as provided in the ITAR (22 CFR, part 121) for USML shipments. Such transmittal shall be without material change or amendment of the proof of filing citation as provided to the carrier by the USPPI or the authorized agent.

(b) * * * If the export information is filed electronically via the AES, the carrier is responsible for transmitting to the CBP Port Director at the port of exportation the appropriate AES exemption legend as provided in § 30.65 of this part and the AES proof of filing citation as provided in ITAR (22 CFR, part 121) for USML shipments. Such transmittal shall be without material change or amendment of the exemption legend or the proof of filing citation as provided to the carrier by the USPPI or the authorized agent. * * *

* * * * *

(f) Information on items identified on the CCL of the EAR (15 CFR Supp. No. 1 to part 774) or the USML of the ITAR (22 CFR, part 121) that would otherwise require the filing of an SED, must be filed through AES. The exporting carrier must not accept paper SEDs or cargo that does not have the appropriate AES filing exemption legend as set forth in § 30.65 of this part and the AES proof of filing citation as provided for in the ITAR (22 CFR, part 121) for USML shipments. Acceptance of paper SEDs or cargo for items on the CCL or USML without the appropriate exemption legend or proof of filing citation constitutes a violation of the provisions of these regulations, and renders such carrier subject to the penalties provided for in § 30.95 of this part.

* * * * *

■ 9. Amend § 30.23 by adding a sentence to the end of the paragraph to read as follows:

§ 30.23 Requirements for the filing of Shipper's Export Declarations by pipeline carriers.

* * If the merchandise transported by pipeline is identified on the CCL of the EAR (15 CFR Supplement No. 1 to part 774) or the USML of the ITAR (22 CFR, Part 121), and requires an SED, the data regarding the shipment must be filed electronically through the AES.

* * * * *

Subpart E—Electronic Filing Requirements—Shipper's Export Information

■ 10. Revise § 30.60(a) to read as follows:

§ 30.60 General requirements for filing export and manifest data electronically using the AES.

* * * * *

(a) *Participation.* Filing using the AES is mandatory for those items identified on the CCL of the EAR (15 CFR Supplement No. 1 to part 774) or the USML of the ITAR (22 CFR, part 121) and that would otherwise require the filing of an SED. All other participation in the AES is voluntary. Information for items identified on the CCL or the USML filed via AES must be filed by the USPPI or the authorized agent. A Data Entry Center (DEC), service center, or port authority may transmit an AES record for CCL or USML items, completed by the USPPI or the authorized agent, without obtaining a power of attorney or written authorization. A DEC, service center, or port authority must have a power of attorney or written authorization from the USPPI or foreign principal party in interest if it completes any export information in AES for CCL or USML shipments. Filers may also use a software package designed by an AES certified software vendor. Certified trade participants (filing agents) can transmit to and receive data from the AES pertaining to merchandise being exported from the United States. Participants in the AES process, who may apply for AES certification, include USPPIs or the authorized agents, ocean carriers, software vendors, or any organization acting as a service center. Once becoming certified, an AES filer (filing agent) must agree to stay in complete compliance with all export rules and regulations.

* * * * *

■ 11. Amend § 30.61 as follows:
■ a. Revise the introductory text.
■ b. Revise paragraph (b).
■ c. Remove paragraph (c).

The revisions read as follows:

§ 30.61 Electronic filing options.

As an alternative to filing paper SEDs (Option 1), two electronic filing options (Option 2 and 4) for transmitting shipper's export information are available to U.S. principal parties or the authorized filing agent. The electronic filing Option 4 takes into account that complete information concerning export shipments is not always available prior to exportation. Information on the export of items identified on the CCL of the EAR (15 CFR Supplement No. 1 to part 774) or the USML of the ITAR (22 CFR, part 121) that would otherwise require the filing of an SED must be filed using Option 2. Option 4 may only be used when the appropriate licensing agency has granted the USPPI authorization to use this option. The available AES electronic filing options are as follows:

* * * * *

(b) *AES with no information transmitted prior to exportation (Option 4).* Option 4 is only available for approved USPPIs and requires *no* export information to be transmitted electronically using AES prior to exportation. For approved Option 4 filers, all shipments (other than those requiring an export license, unless specifically approved by the licensing agency for Option 4 filing, and those specifically required under electronic filing Option 2), by all methods of transportation, may be exported with transmission as soon as it is known, but no later than ten (10) working days from the date of exportation. Shipments of used vehicles between the United States

and Puerto Rico may be filed using Option 4. Certified AES authorized filing agents or service centers may transmit information post departure on behalf of approved Option 4 USPPIs, or the USPPI may transmit the data. All USPPIs filing a Letter of Intent for Option 4 filing privileges will be cleared through a formal review process by CBP, the Census Bureau, and other federal government agencies participating in the AES (partnership agencies) in accordance with provisions contained in § 30.62. The USPPI or the authorized agent must provide the exporting carrier with the USPPI's Option 4 AES exemption legend as described in § 30.65.

■ 12. Amend § 30.62 as follows:
■ a. Add an introductory text.
■ b. Revise paragraph (a).
■ c. Redesignate current paragraph (b) as paragraph (e).
■ d. Add a new paragraph (b).
■ e. Add paragraphs (c) and (d).

The additions and revisions read as follows:

§ 30.62 AES/AES *Direct* Certification, qualification, and standards.

Certification for AES filing will apply to the USPPI, authorized forwarding agent, ocean carrier, or any organization acting as a service center transmitting export information electronically using the AES.

(a) *AES Certification Process.* Applicants interested in AES filing must submit a Letter of Intent to the Census Bureau in accordance with the provisions contained in § 30.60. CBP and the Census Bureau will assign client representatives to work with the applicant to prepare them for AES certification. The AES applicant must perform an initial two-part communication test to ascertain whether the applicant's system is capable of both transmitting data to, and receiving data from, the AES. The applicant must demonstrate specific system application capabilities. The capability to correctly handle these system applications is the prerequisite to certification for participation in the AES. The applicant must successfully transmit the AES certification test. The CBP's and Census Bureau's client representatives provide assistance during certification testing. These representatives make the sole determination as to whether or not the applicant qualifies for certification. Upon successful completion of certification testing, the applicant's status is moved from testing mode to operational mode. Upon certification, the filer will be required to maintain an acceptable level of performance in AES filings. The certified AES filer may be required to repeat the certification testing process at any time to ensure that operational standards for quality and volume of data are maintained. The Census Bureau will provide the certified AES filer with a certification notice after the applicant has been approved for operational status. The certification notice will include:

(1) The date that filers may begin transmitting ''live'' data electronically using AES;

(2) Reporting instructions; and

(3) Examples of the required AES exemption legends.

(b) *AESDirect Certification process.* Applicants interested in AES*Direct* filing or its by-products AESWebLink, AESPCLink, or AES EDI Upload must complete the online AES*Direct* registration form. After submitting the registration, an AES*Direct* filing account is created for the filing company. The applicant will receive separate e-mails providing an AES*Direct* user name, temporary administrator code, and temporary password. The filer uses the temporary administrator code to create a permanent administrator code that allows the user to create a permanent password. The user name and new permanent password will allow the filer to complete certification testing. Upon successful completion of the certification testing, notification by e-mail will be sent when an account is fully activated for filing via AES*Direct*. Print the page congratulating the filer on passing the test for retention purposes. The activation notice will specify which AES filing status the account has been authorized.

(c) *Filing agent certification.* Once an authorized filing agent has successfully completed the certification process, the USPPI using that agent does not need further AES certification. The certified filing agent must have a properly executed power of attorney, a written authorization from the USPPI or foreign principal party in interest, or an SED signed by the USPPI to transmit their data electronically using the AES. The USPPI or authorized agent that utilizes a service center or port authority must complete certification testing, unless the service center or port authority has a formal power of attorney or written authorization from the USPPI to file the export information on behalf of the USPPI.

(d) *AES filing standards.* The certified AES filer's data will be monitored and reviewed for quality, timeliness, and coverage. The Census Bureau will notify the AES filer if the filer fails to maintain an acceptable level of quality, timeliness, and coverage in the transmission of export data or fails to maintain compliance with Census Bureau regulations contained in this Section. The Census Bureau, if necessary, will take appropriate action to correct the specific situation(s). In the case of AES*Direct,* when submitting a registration form to AES*Direct,* the registering company is certifying that it will be in compliance with all applicable laws and regulations. This includes complying with the following security requirements:

(1) AES*Direct* user names, administrator codes, and passwords are to be neither written down nor disclosed to any unauthorized user or any persons outside of the registered company. Filers must change administrator codes or passwords for security purposes when prompted to do so.

(2) Registered companies are responsible for those persons having a user name, administrator code, and password. If an employee with access to the user name, administrator code, and password leaves the company or otherwise is no longer an authorized user, the company must change the password, administrator code, and user name in the system and must do so immediately in order to ensure the integrity and confidentiality of Title 13 data.

(3) Antivirus software must be installed and set to run automatically on all computers that access AES*Direct.* All AES*Direct* registered companies will maintain subscriptions with their antivirus software vendor to keep antivirus lists current. Registered companies are responsible for performing full scans of these systems on a regular basis and eliminating any virus contamination. If the registered company's computer system is infected with a virus, the company should refrain from using AES*Direct* until it is virus free. Failure to comply with these requirements will result in immediate loss of privilege to use AES*Direct* until the registered company can establish to the satisfaction of the Census Bureau's Foreign Trade Division Computer Security Officer that the company's computer systems accessing AES*Direct* are virus free.

* * * * *

■ 13. Amend § 30.63 as follows:
■ a. Revise paragraphs (a)(1) and (b)(13).
■ b. Add paragraphs (b)(14) through (b)(21).
■ c. Revise paragraph (c).

The additions and revisions read as follows:

§ 30.63 Information required to be reported electronically through AES (data elements).

(a) * * *

(1) *USPPI/USPPI identification.*—(i) *Name and address of the USPPI.* For details on the reporting responsibilities of USPPIs, *see* § 30.4 and § 30.7 (d)(1), (2), (3), and (e).

(ii) *USPPI's profile.* The USPPI's EIN or Social Security Number (SSN) and the USPPI's name, address, contact, and telephone number must be reported with every shipment. If neither EIN or SSN is available for the USPPI, as in the case of a foreign entity being shown as the USPPI as defined in § 30.7(d), the border crossing number, passport number, or any other number assigned by CBP is required to be reported. (*See* § 30.7(d)(2) for a detailed description of the EIN.)

(b) * * *

(13) *Filing option indicator.* Report the 1-character filing option that indicates Option 2 or 4 filing.

(14) *Directorate of Defense Trade Controls (DDTC) Registration Number.* The number assigned by DDTC to persons who are required to register per Part 122 of the ITAR (22 CFR, 120–130), that has an authorization (license or exemption) from DDTC to export the article.

(15) *DDTC Significant Military Equipment (SME) Indicator.* A term used to designate articles on the USML for which special export controls are warranted because of their capacity for substantial military utility or capability. *See* § 120.7 of the ITAR 22 CFR, parts 120–130, for a definition of SME and § 121.1 for items designated as SME articles.

(16) *DDTC Eligible Party Certification Indicator.* Certification by the U.S. exporter that the exporter is an eligible party to participate in defense trade. *See* ITAR 22 CFR 120.1(c). This certification is required only when an exemption is claimed.

(17) *DDTC USML Category Code.* The USML category of the article being exported (22 CFR, part 121).

(18) *DDTC Unit of Measure (UOM).* This unit of measure is the UOM covering the article being shipped as described on the export authorization or declared under an ITAR exemption.

(19) *DDTC Quantity.* This quantity is for the article being shipped. The quantity is the total number of units that corresponds to the DDTC Unit of Measure Code.

(20) *DDTC Exemption Number.* The exemption number is the specific citation from the Code of Federal Regulations (22 CFR, parts 120–130) that exempts the shipment from the requirements for a license or other written authorization from DDTC.

(21) *DDTC Export License Line Number.* The line number of the State Department export license that corresponds to the article being exported.

(c) *Optional data elements are as follows:*

(1) *Transportation Reference Number for other than vessel shipments.*

(i) *Air Shipments.* Report the master air waybill for air shipments. The air waybill number is the reservation number assigned by the carrier to hold space on the airplane for cargo being exported.

(ii) *Rail Shipments.* Report the bill of lading (BOL) number for all rail shipments. The BOL number is the reservation number assigned by the carrier to hold space on the rail car for cargo being exported.

(iii) *Truck Shipments.* Report the Freight or Pro Bill number for all truck shipments. The Freight or Pro Bill number is the number assigned by the carrier to hold space on the truck for cargo being exported. The Freight or Pro Bill number correlates to a bill of lading number, air waybill number of Trip number for multi-modal shipments.

2. *Seal number.* Report the security seal number of the seal placed on the equipment.

■ 14. Revise § 30.65 to read as follows:

§ 30.65 Annotating the proper exemption legends or proof of filing citations for shipments transmitted electronically.

(a) Items identified on the USML must meet the predeparture reporting requirements identified in the ITAR (22 CFR, part 120–130) for the State Department requirements concerning AES proof of filing citations and time and place of filing.

(b) For shipments other than USML, the USPPI or the authorized agent is responsible for annotating the proper exemption legend on the bill of lading, air waybill, or other commercial loading document for presentation to the carrier prior to tendering the cargo to the exporting carrier. The carrier is responsible for transmitting the appropriate exemption legend to the CBP Port Director at the port of exportation as stated in § 30.21 and § 30.22 of this part. Such transmittal shall be without material change or amendment of the exemption legend as provided to the carrier by the USPPI or the authorized agent. The exemption legend will identify that the shipment information has been accepted as transmitted and electronically filed using the AES. The exemption legend must appear on the bill of lading, air waybill, or other commercial loading documentation and the manifest and must be clearly visible and include either of the following:

(1) For shipments other than USML, the exemption legend will include the statement, ''NO SED REQUIRED–AES,'' followed by the filer's identification number and a unique shipment reference number referred to as the External Transaction Number (XTN) or the returned confirmation number provided by AES when the transmission is accepted, referred to as the Internal Transaction Number (ITN). Items on the USML must meet the predeparture reporting requirements in the ITAR (22 CFR parts 120–130).

(2) For USPPIs who have been approved to participate in Filing Option 4, the exemption statement, ''NO SED REQUIRED–AES4,'' followed by the USPPI's EIN followed by the filer's identification number if other than the USPPI files the data.

■ 15. Revise § 30.66 to read as follows:

§ 30.66 Support, documentation and record keeping requirements.

(a) *Support.* ''ASKAES@census.gov'' is an online service that allows electronic filers to seek assistance pertaining to AES. AES*Direct* is supported by a help desk available twelve (12) hours a day, seven (7) days a week.

(b) *Documentation.* Filers using the AES*Direct* are able to print out from the AES*Direct* a validated record of the filer's submission. Filers using AES are able to print records containing date of submission and a unique identification number for each AES record submitted. The Census Bureau will maintain an electronic file of data sent through AES to ensure that an individual is able to receive from the system, a validated record of the submission. The USPPI or the authorized agent of the USPPI or the authorized agent of the foreign principal party in interest may request a copy of the electronic record submitted as provided for in § 30.91 of this part.

(c) *Recordkeeping.* All parties to the export transaction (owners and operators of the exporting carriers and U.S. principal party and/or the authorized agents) must retain documents or records pertaining to the shipment for five (5) years from the date of export. CBP, the Census Bureau, and other participating agencies may require that these documents be produced at any time within the 5-year time period for inspection or copying. These records may be retained in an elected format, including electronic or hard copy as provided in the applicable agency's regulations. Acceptance of the

documents by CBP or the Census Bureau does not relieve the USPPI or the authorized agent from providing complete and accurate information after the fact. The Department of State or other regulatory agencies may have additional recordkeeping requirements for exports.

■ 16. Amend Appendix A as follows:
■ a. Add introductory text.
■ b. Revise items A.5, A.6, and A.10.
■ c. Revise paragraphs B and C.
■ d. Add paragraph D.

The additions and revisions read as follows:

Appendix A to Part 30—Format for the Letter of Intent, Automated Export System (AES)

The first requirement for participation in AES is a Letter of Intent. The Letter of Intent is a written statement of a company's desire to participate in the AES. It must set forth a commitment to develop, maintain, and adhere to CBP and Census performance requirements and operations standards. Once the letter of intent is received, a CBP Client Representative and U.S. Census Bureau Client Representative will be assigned to the company. Census will forward additional information to prepare the company for participation in AES.

A. Letters of Intent should be on company letterhead and must include:

* * * * *

5. Computer Site Location Address, City, State, Postal Code (Where transmissions will be initiated)

6. Type of Business—USPPI, Freight Forwarder/Broker, Ocean Carrier, Software Vendor, Service Center, etc. (Indicate all that apply)

(i) Freight Forwarders/Brokers, indicate the number of USPPIs for whom you file export information (SEDs)

(ii) USPPIs, indicate whether you are applying for AES Option 2 or Option 4* * *

10. Filer Code—EIN, SSN or SCAC (Indicate all that apply)

* * * * *

B. The following self-certification statement, signed by an officer of the company, must be included in your letter of intent: ''We (COMPANY NAME) certify that all statements made and all information provided herein are true and correct. I understand that civil and criminal penalties, including forfeiture and sale, may be imposed for making false or fraudulent statements herein, failing to provide the requested information or for violation of U.S. laws on exportation (13 U.S.C. 305; 22 U.S.C. 401; 18 U.S.C. 1001; 50 U.S.C. App. 2410).''

C. The AES Option 4 privilege allows a USPPI to submit complete data at any time prior to or after exportation provided complete data are submitted within 10 working days after exportation. Participants will be reviewed by several government agencies prior to acceptance into the Option 4 program.

D. Send AES or Option 4 Letter of Intent to: Chief, Foreign Trade Division, U.S. Census Bureau, Washington, DC 20233 or the copy can be faxed to: 301–457–1159.

Appendix B to Part 30 [Reserved]

■ 17. Remove and reserve Appendix B.
■ 18. Amend Appendix C as follows:
■ a. Under the heading ''Part II—Export Information Codes,'' add four items to the last line of listed items (after ''AE'' and before the parenthetical sentence).
■ b. Under ''Part III—License Codes,'' revise the first subheading.
■ c. Under ''Part III—License Codes,'' add an item to the last line of the first list of items (after ''C50 ENC'').
■ d. Under ''Part III—License Codes'':
■ 1. Revise the third subheading.
■ 2. Under the current subheading ''Department of State, Office of Defense Trade Controls (ODTC) Codes,'' add an item to the last line of the third list of items (after ''S85 DSP 85'').
■ e. Under ''Part III—License Codes,'' add an item to the last line of the fifth list of items (after ''OPA''), and add a sentence following the new list item under the subheading ''Other License Types.''
■ f. Under the subheading ''Part IV—In-Bond Codes,'' remove two items from the sixth list of items (after ''37 Warehouse Withdrawal for Transportation and Exportation'' and before ''67 Immediate Exportation from a Foreign Trade Zone.''

The additions, revisions, and removals read as follows:

Appendix C to Part 30—Electronic (AES) Filing Codes

Part II—Export Information Codes

* * * * *

ZD Duty deferred shipments filed via AES
FI Impelled foreign military sales
CI Impelled goods donated for charity
OI All other impelled exports

* * * * *

Part III—License Codes

* * * * *

Department of Commerce, Bureau of Industry and Security (BIS) Licenses

* * * * *

C51 AGR

* * * * *

Department of State, Directorate of Defense Trade Controls (DDTC) Codes

* * * * *

S94 DSP–94

* * * * *

Other License Types

* * * * *

SCA Canadian ITAR Exemption

For export license exemptions under International Traffic in Arms Regulations, refer to 22 CFR, Parts 120—130 of the ITAR for the list of export license exemptions.

* * * * *

Part IV—In-Bond Codes

* * * * *

62 Transportation and Exportation [Removed]
63 Immediate Exportation [Removed]

* * * * *

Dated: July 14, 2003.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. 03–18093 Filed 7–16–03; 8:45 am]

BILLING CODE 3510–07–P

Federal Register

Thursday,
July 17, 2003

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed Frameworks for Early-Season Migratory Bird Hunting Regulations; Notice of Meetings; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018–AI93

Migratory Bird Hunting; Proposed Frameworks for Early-Season Migratory Bird Hunting Regulations; Notice of Meetings

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; supplemental.

SUMMARY: The U.S. Fish and Wildlife Service (hereinafter Service or we) is proposing to establish the 2003–04 early-season hunting regulations for certain migratory game birds. We annually prescribe frameworks, or outer limits, for dates and times when hunting may occur and the maximum number of birds that may be taken and possessed in early seasons. Early seasons may open as early as September 1, and include seasons in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. These frameworks are necessary to allow State selections of specific final seasons and limits and to allow recreational harvest at levels compatible with population status and habitat conditions.

DATES: The Service Migratory Bird Regulations Committee will meet to consider and develop proposed regulations for late-season migratory bird hunting and the 2004 spring/summer migratory bird subsistence seasons in Alaska on July 30 and 31, 2003. All meetings will commence at approximately 8:30 a.m. You must submit comments on the proposed migratory bird hunting-season frameworks for Alaska, Hawaii, Puerto Rico, the Virgin Islands, and other early seasons by July 30, 2003, and for the forthcoming proposed late-season frameworks and subsistence hunting seasons in Alaska by August 30, 2003.

ADDRESSES: The Service Migratory Bird Regulations Committee will meet in room 200 of the U.S. Fish and Wildlife Service's Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia. Send your comments on the proposals to the Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms MBSP–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240. All comments received, including names and addresses, will become part of the public record. You may inspect comments during normal business hours at the Service's office in room 4107, 4501 N. Fairfax Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Brian Millsap, Chief, or Ron W. Kokel, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, (703) 358–1714.

SUPPLEMENTARY INFORMATION:

Regulations Schedule for 2003

On May 6, 2003, we published in the **Federal Register** (68 FR 24324) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process, and dealt with the establishment of seasons, limits, the proposed regulatory alternatives for the 2003–04 duck hunting season, and other regulations for migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. On June 23, 2003, we published in the **Federal Register** (68 FR 37362) a second document providing supplemental proposals for early- and late-season migratory bird hunting regulations frameworks and the regulatory alternatives for the 2003–04 duck hunting season. The June 23 supplement also provided detailed information on the 2003–04 regulatory schedule and announced the Service Migratory Bird Regulations Committee (SRC) and Flyway Council meetings.

This document, the third in a series of proposed, supplemental, and final rulemaking documents for migratory bird hunting regulations, deals specifically with proposed frameworks for early-season regulations. It will lead to final frameworks from which States may select season dates, shooting hours, and daily bag and possession limits for the 2003–04 season. We have considered all pertinent comments received through June 27, 2003, on the May 6 and June 23, 2003, rulemaking documents in developing this document. In addition, new proposals for certain early-season regulations are provided for public comment. Comment periods are specified above under **DATES.** We will publish final regulatory frameworks for early seasons in the **Federal Register** on or about August 20, 2003.

Service Migratory Bird Regulations Committee Meetings

Participants at the June 18–19, 2003, meetings reviewed information on the current status of migratory shore and upland game birds and developed 2003–04 migratory game bird regulations recommendations for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the U.S. Virgin Islands; special September waterfowl seasons in designated States; special sea duck seasons in the Atlantic Flyway; and extended falconry seasons. In addition, we reviewed and discussed preliminary information on the status of waterfowl. Participants at the previously announced July 30–31, 2003, meetings will review information on the current status of waterfowl and develop recommendations for the 2003–04 regulations pertaining to regular waterfowl seasons and other species and seasons not previously discussed at the early-season meetings. In accordance with Department of the Interior policy, these meetings are open to public observation and you may submit written comments to the Director of the Service on the matters discussed.

Population Status and Harvest

The following paragraphs provide preliminary information on the status of waterfowl and information on the status and harvest of migratory shore and upland game birds.

May Breeding Waterfowl and Habitat Survey

Habitat conditions for breeding waterfowl have improved over last year in the prairie survey areas, except for eastern South Dakota. Most prairie areas had warm temperatures and plenty of rain this spring. Two areas of dramatic improvement over the past several years were south-central Alberta and southern Saskatchewan, where conditions went from poor to good after much-needed precipitation relieved several years of drought. Other areas in the prairies also improved in condition over 2002, but to a lesser extent. However, years of dry conditions in parts of the United States and Canadian prairies, combined with agricultural practices, have lessened the quality and quantity of residual nesting cover and over-water nest sites in many regions. This could potentially limit production for both dabbling and diving ducks, if the warm spring temperatures and good moisture of 2003 does not result in rapid growth of new cover. Eastern South Dakota was the one area of the prairies where wetland habitat conditions were generally worse than last year, mostly due to low soil moisture, little winter precipitation, and no significant rainfall in April. By the time this region received several inches of rain in May, most birds probably had overflown the area to wetter conditions in other regions to the north and west.

In the northwestern survey areas, habitat was in generally good condition and most areas had normal water levels. The exception was northern Manitoba, where low water levels in small streams

and beaver ponds resulted in overall breeding habitat conditions that were only fair. Warm spring temperatures arrived much earlier this year than the exceptionally late spring last year. However, a cold snap in early May could have hurt early-nesting species such as mallards and pintails, particularly in the northern Northwest Territories.

Habitat conditions in the eastern survey area ranged from excellent to fair. In the southern and western part of this survey area, water and nesting cover were plentiful and temperatures were mild this spring.

Habitat quality decreased to the north, especially in northern and western Quebec, where many shallow marshes and bogs were either completely dry or reduced to mudflats. Beaver-pond habitat was also noticeably less common than normal. To the east in Maine and most of the Maritime provinces, conditions were excellent, with adequate water, vegetation, and warm spring temperatures.

Status of Teal

Breeding population estimates for blue-winged teal from surveyed areas total 5.5 million blue-winged teal, which is above the 4.7 million needed to trigger the 16-day teal season in the Central and Mississippi Flyways, and the 3.3 million needed to trigger the 9-day teal season in the Atlantic Flyway.

Sandhill Cranes

The Mid-Continent Population of Sandhill Cranes has generally stabilized at comparatively high levels, following increases in the 1970s. The Central Platte River Valley, Nebraska, spring index for 2003, uncorrected for visibility, was 316,676 cranes. The most recent photo-corrected 3-year average (for 2000–2002) was 375,875, which is within the established population-objective range of 343,000–465,000 cranes. All Central Flyway States, except Nebraska, allowed crane hunting in portions of their respective States in 2002–03. About 8,800 hunters participated in these seasons, which was 10 percent higher than the number participating in the previous year. An estimated 16,650 cranes were harvested in the Central Flyway during 2001–02 seasons, which was 11% higher than the previous year's estimate. Retrieved harvests in the Pacific Flyway, Canada, and Mexico were estimated to be about 11,650 cranes for the 2002–03 period. The total North American sport harvest, including crippling losses, was estimated at 31,830, which is similar to the previous year's estimate. The long-term trend analysis for the Mid-Continent Population during 1982–2000 indicates that harvests have been increasing at a higher rate than the trend in population growth over the same period.

The fall 2002 pre-migration survey estimate for the Rocky Mountain Population of sandhill cranes was 18,803, which was 12% higher than the previous year's estimate of 16,559. Limited special seasons were held during 2002 in portions of Arizona, Idaho, Montana, New Mexico, Utah, and Wyoming, resulting in a harvest of 639 cranes, which is 29% below the previous year's record high harvest of 898 cranes.

Woodcock

Singing-Ground and Wing-Collection Surveys were conducted to assess the population status of the American woodcock *(Scolopax minor).* Singing-Ground Survey data for 2003 indicate that the numbers of displaying woodcock in the Eastern and Central Regions were unchanged from 2002 ($P>0.10$); although the point estimates of the trends were higher. Trends from the Singing-Ground Survey during 1993–2003 were -1.3 and -1.6 percent change per year for the Eastern and Central regions, respectively ($P<0.05$). There were long-term (1968–03) declines ($P<0.01$) of 2.3 percent per year in the Eastern Region and 1.8 percent per year in the Central Region.

The 2002 recruitment index for the Eastern Region (1.4 immatures per adult female) was similar to the 2001 index, but was 18 percent below the long-term average. The recruitment index for the Central Region (1.6 immatures per adult female) was 17 percent higher than the 2001 index of 1.3 immatures per female, and was similar to the long-term average. The index of daily hunting success in the Eastern Region increased slightly from 1.8 woodcock per successful hunt in 2001 to 1.9 in 2002, but seasonal hunting success declined from 6.9 woodcock per successful hunter in 2001 to 6.6 in 2002. In the Central Region, the daily success index was 2.1 woodcock per successful hunt in both 2001 and 2002; but seasonal hunting success increased from 10.0 woodcock per successful hunter in 2001 to 11.0 in 2002.

Band-tailed Pigeons and Doves

A significant decline in the Coastal population of band-tailed pigeons occurred during 1968–2002, as indicated by the Breeding Bird Survey (BBS); however, no trend was noted over the most recent 10 years. Additionally, mineral-site counts at 10 selected sites in Oregon indicate a general increase over the most recent 10 years. Call-Count Surveys conducted in Washington showed a significant increase during 1998–02 and a nonsignificant increase during 1975–02. According to Harvest Information Program (HIP) surveys, approximately 9,600 pigeons were taken during the 2002–03 season. The Interior band-tailed pigeon population is stable with no trend indicated by the BBS over the short- or long-term periods. An estimated 3,700 birds were taken in 2002–03.

Analyses of Mourning Dove Call-Count Survey data over the most recent 10 years indicated no trend in doves heard in any Management Unit. Between 1966 and 2003, all 3 Units exhibited significant declines. In contrast, for doves seen over the 10-year period, a significant increase was found in the Eastern Unit while no trends were found in the Central and Western Units. Over 38 years, no trend was found for doves seen in the Eastern and Central Units while a decline was indicated for the Western Unit. HIP surveys indicated that about 22,700,000 mourning doves were bagged nationwide during the 2002–03 season.

In Arizona, the white-winged dove population has shown a significant decline between 1962 and 2003. However, the number of whitewings has been fairly stable since the 1970s and, over the most recent 10 years, there is no significant trend indicated. The 2002 harvest estimate from the HIP survey was 102,700. In Texas, the range and density of white-winged doves continue to expand. In 2003, the whitewing population in Texas was estimated to be 2,525,000 birds, an increase of 8.4 percent from 2002. A more inclusive count in San Antonio documented more than 1.3 million birds. HIP surveys indicated a harvest of 943,000 whitewings during the 2002–03 season. The expansion of whitewings northward and eastward from Texas has led to reports of nesting in Louisiana, Arkansas, Oklahoma, Kansas, and Missouri. They have been sighted in Colorado, Montana, Nebraska, Iowa, and Minnesota. Whitewings are believed to be expanding northward from Florida and have been seen in Georgia, the Carolinas, and Pennsylvania.

White-tipped doves are maintaining a relatively stable population in the Lower Rio Grande Valley of Texas. They are most abundant in cities and, for the most part, are not available to hunting. The 2003 survey averaged 0.95 birds per stop, a 2 percent decrease over the 2002 survey. During the special 4-day whitewing season, about 2,700

whitetips were bagged, according to State harvest-survey estimates.

Review of Public Comments

The preliminary proposed rulemaking (May 6 **Federal Register**) opened the public comment period for migratory game bird hunting regulations and the proposed regulatory alternatives for the 2003–04 duck hunting season. Comments concerning early-season issues and the proposed alternatives are summarized below and numbered in the order used in the May 6 **Federal Register** document. Only the numbered items pertaining to early-seasons issues and the proposed regulatory alternatives for which written comments were received are included. Consequently, the issues do not follow in direct numerical or alphabetical order.

We received recommendations from all four Flyway Councils. Some recommendations supported continuation of last year's frameworks. Due to the comprehensive nature of the annual review of the frameworks performed by the Councils, support for continuation of last year's frameworks is assumed for items for which no recommendations were received. Council recommendations for changes in the frameworks are summarized below. We seek additional information and comments on the recommendations in this supplemental proposed rule. New proposals and modifications to previously described proposals are discussed below. Wherever possible, they are discussed under headings corresponding to the numbered items in the May 6, 2003, **Federal Register** document.

1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) General Harvest Strategy, (B) Regulatory Alternatives, including specification of framework dates, season length, and bag limits, (C) Zones and Split Seasons, and (D) Special Seasons/Species Management. The categories correspond to previously published issues/discussions, and only those containing substantial recommendations are discussed below.

D. Special Seasons/Species Management

i. September Teal Seasons

Council Recommendations: The Atlantic Flyway Council recommended that States that have participated in the recent experimental teal season (Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia) be offered an operational September teal season beginning in 2003. They recommend that the season run for nine consecutive days during September 1–30, 2003, with a bag limit not to exceed four teal, whenever the breeding population estimate for blue-winged teal exceeds 3.3 million in the traditional survey area. Delaware, Georgia, North Carolina, and Virginia may have shooting hours between one-half hour before sunrise and sunset, while shooting hours for Maryland and South Carolina may be between sunrise and sunset.

The Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended that the 16-day September teal seasons continue to be used when the blue-winged teal breeding population is at or above 4.7 million, based on the recently completed report, ''Assessment of 16-Day September Teal Seasons 1998–2000 in the Central and Mississippi Flyways.''

The Central Flyway Council recommended that Nebraska's experimental September teal season become operational.

Service Response: In 2001, the Atlantic Flyway Council requested operational status for a special teal season in the four States (Delaware, Georgia, Maryland, and Virginia) that fully met the established criteria. During the ensuing comment period, North Carolina and South Carolina submitted written requests that we reconsider our proposed decision to discontinue their September season based upon data-analysis inconsistencies and requested further analysis. We decided to continue the 9-day special season experimentally in all six States until a final report was submitted.

In 2002, we delayed action on the continuance of these seasons in the Atlantic Flyway until completion of a final report. Based on the criteria that were established and agreed to by the individual participating States and the Service, we propose operational September teal seasons in Delaware, Virginia, Maryland, and Georgia. However, the States of North Carolina and South Carolina have not met the criteria that hunter nontarget attempt rates be less than 25 percent over the 3-year experimental period. Thus, we propose to suspend the season in these two States.

Although we are aware of the Atlantic Flyway's request that we evaluate hunter performance on a pooled basis among States rather than on a State-by-State basis, we do not believe that it is appropriate to continue these seasons given the explicit criteria in the MOU to evaluate hunter performance on a State basis. All States, including North Carolina and South Carolina, signed the MOU at the start of the experimental study in 1998 and agreed to the conditions of the MOU that stipulated that the attempts at nontarget species not exceed 25 percent on an individual State basis.

Regarding Nebraska's special teal season, we do not concur with the Central Flyway Council's recommendation for operational status of this season. We believe that the season should remain experimental until a final report on the experiment is completed.

ii. September Teal/Wood Duck Seasons

Council Recommendations: The Atlantic Flyway Council recommended that the bag limit for Florida's special September wood duck and teal season remain at 4 wood ducks and teal in the aggregate.

Service Response: In 2001, we granted operational status to September teal/wood duck seasons in the States of Florida, Kentucky, and Tennessee. The September teal/wood duck season in all three States is a 5-day season, with a daily bag limit of four birds, no more than two of which can be wood ducks. We do not support the Council's request for a 4-wood duck daily bag limit in Florida, as previously existed. This change was a condition of grandfathering these special seasons. Additionally, we have concerns about our ability to track the status of Florida's wood duck population and the low hen wood duck survival rates noted during the recently completed Monitoring Initiative.

iii. Youth Hunt

Council Recommendations: The Atlantic Flyway Council recommended that the Service allow all States the option of holding ''youth waterfowl hunt days'' on nonconsecutive hunting days, while maintaining the requirement that they must be held on non-school days.

Service Response: In 2000, in light of continuing interest from the Flyway Councils, we decided to expand the special youth waterfowl hunt from 1 day to 2 consecutive days. Anecdotal data suggested that the special hunt is very popular and has provided an excellent opportunity to introduce youth hunters to the sport of waterfowling and waterfowl and wetland conservation. Expansion of the special hunt to 2 consecutive days was implemented to help reduce travel difficulties and scheduling conflicts inherent with the 1-day hunt previously implemented.

In 2001, the Service concurred with the Atlantic Flyway Council's recommendation to expand the youth hunt to 2 consecutive hunting days because Sunday hunting is prohibited in some States in the Flyway. We do not support further expansion of the special youth hunt to 2 nonconsecutive hunting days. Further separation of hunting days would be inconsistent with the purpose identified earlier by the Flyway Councils for expanding the special hunt to 2 days, which was to reduce travel difficulties and scheduling conflicts inherent with the former 1-day hunt.

2. Sea Ducks

During last year's season, we were made aware of a conflict between the framework closing date for ducks and that for sea ducks. The latest closing dates for ducks was extended to the last Sunday in January, while the closing date for sea ducks remained at January 20. Therefore, to avoid the complications of sea ducks in the regular-duck-season bag, we propose that the closing date for sea ducks be January 31.

4. Canada Geese

A. Special Seasons

Council Recommendations: The Atlantic Flyway Council recommended that the Service increase the special September Canada goose hunting season bag limit to 8, with no possession limit, beginning with the 2003–04 hunting season. They further recommended that the framework closing date for the special September Canada goose season in North Carolina's Northeast Hunt Zone be extended from September 20 to September 30. They also recommended that the September 1–30 framework dates for Rhode Island's September resident Canada goose season be made operational.

The Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended that the experimental early Canada goose season in Huron, Tuscola, and Saginaw counties in Michigan be extended for 1 year. Further, the Committees recommended that the Service grant operational status to Minnesota's Special September Canada Goose Season extension (16–22 September).

The Central Flyway Council recommended that South Dakota's 3-year experimental September Canada goose season (September 16–30) become operational for all of eastern South Dakota (east of the Missouri River), beginning in 2003.

The Pacific Flyway Council recommended that Wyoming's special-season framework for the Rocky Mountain population of western Canada geese consist of an 8-day season during September 1–15 in Bear River, Salt River, Farson-Eden Area, Bridger Valley, and Teton Counties, and the Little Snake River drainage portion of Carbon County. All participants must have a valid State permit for the special season. The number of permits may not exceed 240 in the Bear River, Salt River, Farson-Eden Area, and Bridger Valley area, and 20 permits in the Little Snake River drainage portion of Carbon County. The daily bag limit would be 3, with season and possession limits of 6. Where applicable, the season must be concurrent with the September portion of the sandhill crane season.

Service Response: We concur with the Atlantic Flyway Council's request regarding North Carolina and Rhode Island. We also concur with the recommendation to increase the daily bag limit in the September Canada goose seasons from 5 to 8, but believe that the possession limit should be 16.

Regarding South Dakota's experimental September Canada goose season, we believe the season should remain experimental until a final report is prepared, approved by the Flyway Council, and transmitted to the Service. This is consistent with the normal procedures for approval of experimental seasons. We do not concur with the recommendation for operational status of any areas outside the current experimental area. Special seasons after September 15 in other portions of the State initially must be experimental.

We concur with the recommendations from the Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council and the Pacific Flyway Council.

B. Regular Seasons

Council Recommendations: The Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended that the framework opening date for all species of geese for the regular goose seasons in Michigan and Wisconsin be September 16, 2003.

Service Response: We concur.

9. Sandhill Cranes

Council Recommendations: The Central Flyway Council recommended accepting the 2002 Rocky Mountain population of sandhill cranes harvest allocation of 668 birds as proposed by the Pacific Flyway.

Service Response: We concur.

20. Puerto Rico

Written Comments: The Puerto Rico Department of Natural and Environmental Resources requested increasing the daily bag limit for doves from 10 to 15 doves in the aggregate, of which no more than 3 could be mourning doves.

Service Response: We concur. Surveys in Puerto Rico indicate that white-winged and Zenaida doves are increasing while mourning doves are declining. Additionally, a review of banding records failed to document any interchange of doves between Puerto Rico and the United States; thus, a change in hunting regulations would have no impact on U.S. dove populations.

Public Comment Invited

The Department of the Interior's policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. We intend that adopted final rules be as responsive as possible to all concerned interests and, therefore, seek the comments and suggestions of the public, other concerned governmental agencies, nongovernmental organizations, and other private interests on these proposals. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations to the address indicated under the caption **ADDRESSES.**

Special circumstances involved in the establishment of these regulations limit the amount of time that we can allow for public comment. Specifically, two considerations compress the time in which the rulemaking process must operate: (1) the need to establish final rules at a point early enough in the summer to allow affected State agencies to adjust their licensing and regulatory mechanisms; and (2) the unavailability, before mid-June, of specific, reliable data on this year's status of some waterfowl and migratory shore and upland game bird populations. Therefore, we believe that to allow comment periods past the dates specified in **DATES** is contrary to the public interest.

Before promulgation of final migratory game bird hunting regulations, we will take into consideration all comments received. Such comments, and any additional information received, may lead to final regulations that differ from these proposals. You may inspect comments received on the proposed annual regulations during normal business hours at the Service's office in room

4107, 4501 North Fairfax Drive, Arlington, Virginia. For each series of proposed rulemakings, we will establish specific comment periods. We will consider, but possibly may not respond in detail to, each comment. However, as in the past, we will summarize all comments received during the comment period and respond to them in the final rule.

NEPA Consideration

NEPA considerations are covered by the programmatic document, ''Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14),'' filed with the Environmental Protection Agency on June 9, 1988. We published Notice of Availability in the **Federal Register** on June 16, 1988 (53 FR 22582). We published our Record of Decision on August 18, 1988 (53 FR 31341). In addition, an August 1985 environmental assessment entitled ''Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands'' is available from the address indicated under the caption **ADDRESSES.**

In a proposed rule published in the April 30, 2001, **Federal Register** (66 FR 21298), we expressed our intent to begin the process of developing a new EIS for the migratory bird hunting program.

Endangered Species Act Consideration

Prior to issuance of the 2003–04 migratory game bird hunting regulations, we will consider provisions of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531–1543; hereinafter the Act) to ensure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened or modify or destroy its critical habitat and is consistent with conservation programs for those species. Consultations under Section 7 of this Act may cause us to change proposals in this and future supplemental proposed rulemaking documents.

Executive Order 12866

This rule is economically significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The migratory bird hunting regulations are economically significant and are annually reviewed by OMB under Executive Order 12866. As such, a cost/benefit analysis was prepared in 1998 and is further discussed below under the heading Regulatory Flexibility Act. Copies of the cost/benefit analysis are available upon request from the address indicated under the caption **ADDRESSES.**

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite comments on how to make this rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Would the rule be easier to understand if it were divided into more (but shorter) sections?

(5) Is the description of the rule in the ''Supplementary Information'' section of the preamble helpful in understanding the rule?

(6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of the Executive Secretariat and Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail comments to this address: *Exsec@ios.doi.gov.*

Regulatory Flexibility Act

These regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In 1998, we analyzed the economic impacts of the annual hunting regulations on small business entities in detail, and issued a Small Entity Flexibility Analysis (Analysis). The 1998 Analysis documented the significant beneficial economic effect on a substantial number of small entities and estimated that migratory bird hunters would spend between $429 million and $1.084 billion at small businesses in 1998. The primary source of information about hunter expenditures for migratory game bird hunting is the National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, which is conducted at 5-year intervals. The 1998 Analysis utilized the 1996 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns. In 2002, the results from the 2001 National Hunting and Fishing Survey were released. This year, we will update the 1998 Analysis with information from the 2001 National Hunting and Fishing Survey. Copies of the 1998 Analysis are available upon request from the Division of Migratory Bird Management.

Small Business Regulatory Enforcement Fairness Act

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule has an annual effect on the economy of $100 million or more. However, because this rule establishes hunting seasons, we do not plan to defer the effective date required by 5 U.S.C. 801 under the exemption contained in 5 U.S.C. 808(1).

Paperwork Reduction Act

We examined these regulations under the Paperwork Reduction Act of 1995. The various recordkeeping and reporting requirements imposed under regulations established in 50 CFR part 20, subpart K, are utilized in the formulation of migratory game bird hunting regulations. Specifically, OMB has approved the information collection requirements of the Migratory Bird Harvest Information Program and assigned clearance number 1018–0015 (expires 10/31/2004). This information is used to provide a sampling frame for voluntary national surveys to improve our harvest estimates for all migratory game birds in order to better manage these populations. OMB has also approved the information collection requirements of the Sandhill Crane Harvest Questionnaire and assigned clearance number 1018–0023 (expires 07/31/2003). The information from this survey is used to estimate the magnitude and the geographical and temporal distribution of the harvest, and the portion it constitutes of the total population.

A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities. Therefore, this rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Civil Justice Reform—Executive Order 12988

The Department, in promulgating this proposed rule, has determined that this rule will not unduly burden the judicial system and meets the requirements of

sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings Implication Assessment

In accordance with Executive Order 12630, this proposed rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules allow hunters to exercise otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

Energy Effects—Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this proposed rule is a significant regulatory action under Executive Order 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and tribes to determine which seasons meet their individual needs. Any State or tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in accordance with Executive Order 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 2003–04 hunting season are authorized under 16 U.S.C. 703–712 and 16 U.S.C. 742 a–j.

Dated: July 9, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

Proposed Regulations Frameworks for 2003–04 Early Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department of the Interior approved the following proposed frameworks, which prescribe season lengths, bag limits, shooting hours, and outside dates within which States may select hunting seasons for certain migratory game birds between September 1, 2003, and March 10, 2004.

General

Dates: All outside dates noted below are inclusive.

Shooting and Hawking (taking by falconry) Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are twice the daily bag limit.

Flyways and Management Units

Waterfowl Flyways

Atlantic Flyway—includes Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Mississippi Flyway—includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

Central Flyway—includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

Pacific Flyway—includes Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming not included in the Central Flyway.

Management Units

Mourning Dove Management Units

Eastern Management Unit—All States east of the Mississippi River, and Louisiana.

Central Management Unit—Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

Western Management Unit—Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

Woodcock Management Regions

Eastern Management Region—Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Central Management Region—Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin.

Other geographic descriptions are contained in a later portion of this document.

Compensatory Days in the Atlantic Flyway: In the Atlantic Flyway States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, and Virginia, where Sunday hunting is prohibited statewide by State law, all Sundays are closed to all take of migratory waterfowl (including mergansers and coots).

Special September Teal Season

Outside Dates: Between September 1 and September 30, an open season on all species of teal may be selected by the following States in areas delineated by State regulations:

Atlantic Flyway—Delaware, Florida, Georgia, Maryland, and Virginia.

Mississippi Flyway—Alabama, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Tennessee.

Central Flyway—Colorado (part), Kansas, Nebraska (part), New Mexico (part), Oklahoma, and Texas. The season in Nebraska is experimental.

Hunting Seasons and Daily Bag Limits: Not to exceed 16 consecutive days, except in the Atlantic Flyway and Nebraska in the Central Flyway, where

the season may not exceed 9 consecutive days. The daily bag limit is 4 teal.

Shooting Hours:

Atlantic Flyway—One-half hour before sunrise to sunset except in Maryland, where the hours are from sunrise to sunset.

Mississippi and Central Flyways—One-half hour before sunrise to sunset, except in the States of Arkansas, Illinois, Indiana, Missouri, and Ohio, where the hours are from sunrise to sunset.

Special September Duck Seasons

Florida, Kentucky and Tennessee: In lieu of a special September teal season, a 5-consecutive-day season may be selected in September. The daily bag limit may not exceed 4 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks.

Iowa: Iowa may hold up to 5 days of its regular duck hunting season in September. All ducks that are legal during the regular duck season may be taken during the September segment of the season. The September season segment may commence no earlier than the Saturday nearest September 20 (September 20). The daily bag and possession limits will be the same as those in effect last year, but are subject to change during the late-season regulations process. The remainder of the regular duck season may not begin before October 10.

Special Youth Waterfowl Hunting Days

Outside Dates: States may select two consecutive days (hunting days in Atlantic Flyway States with compensatory days) per duck-hunting zone, designated as ''Youth Waterfowl Hunting Days,'' in addition to their regular duck seasons. The days must be held outside any regular duck season on a weekend, holidays, or other non-school days when youth hunters would have the maximum opportunity to participate. The days may be held up to 14 days before or after any regular duck-season frameworks or within any split of a regular duck season, or within any other open season on migratory birds.

Daily Bag Limits: The daily bag limits may include ducks, geese, mergansers, coots, moorhens, and gallinules and would be the same as those allowed in the regular season. Flyway species and area restrictions would remain in effect.

Shooting Hours: One-half hour before sunrise to sunset.

Participation Restrictions: Youth hunters must be 15 years of age or younger. In addition, an adult at least 18 years of age must accompany the youth hunter into the field. This adult may not duck hunt but may participate in other seasons that are open on the special youth day.

Scoter, Eider, and Oldsquaw Ducks (Atlantic Flyway)

Outside Dates: Between September 15 and January 31.

Hunting Seasons and Daily Bag Limits: Not to exceed 107 days, with a daily bag limit of 7, singly or in the aggregate of the listed sea-duck species, of which no more than 4 may be scoters.

Daily Bag Limits During the Regular Duck Season: Within the special sea duck areas, during the regular duck season in the Atlantic Flyway, States may choose to allow the above sea duck limits in addition to the limits applying to other ducks during the regular duck season. In all other areas, sea ducks may be taken only during the regular open season for ducks and are part of the regular duck season daily bag (not to exceed 4 scoters) and possession limits.

Areas: In all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York; in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 1 mile of open water from any shore, island, and emergent vegetation in New Jersey, South Carolina, and Georgia; and in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 800 yards of open water from any shore, island, and emergent vegetation in Delaware, Maryland, North Carolina and Virginia; and provided that any such areas have been described, delineated, and designated as special sea-duck hunting areas under the hunting regulations adopted by the respective States.

Special Early Canada Goose Seasons

Atlantic Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1–15 may be selected for the Eastern Unit of Maryland and Delaware. Seasons not to exceed 30 days during September 1–30 may be selected for the Northeast Hunt Unit of North Carolina, New Jersey, and Rhode Island. Except for experimental seasons described below, seasons may not exceed 25 days during September 1–25 in the remainder of the Flyway. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Daily Bag Limits: Not to exceed 8 Canada geese.

Experimental Seasons

Experimental Canada goose seasons of up to 25 days during September 1–25 may be selected for the Montezuma Region of New York and the Lake Champlain Region of New York and Vermont. Experimental seasons of up to 30 days during September 1–30 may be selected by Connecticut, Florida, Georgia, New York (Long Island Zone), North Carolina (except in the Northeast Hunt Unit), and South Carolina. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Daily Bag Limits: Not to exceed 8 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1–15 may be selected, except in the Upper Peninsula in Michigan, where the season may not extend beyond September 10, and in Minnesota (except in the Northwest Goose Zone), where a season of up to 22 days during September 1–22 may be selected. The daily bag limit may not exceed 5 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

An experimental Canada goose season of up to 10 consecutive days during September 1–10 may be selected by Michigan for Huron, Saginaw, and Tuscola Counties, except that the Shiawassee National Wildlife Refuge, Shiawassee River State Game Area Refuge, and the Fish Point Wildlife Area Refuge will remain closed. The daily bag limit may not exceed 2 Canada geese.

Central Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1–15 may be selected. The daily bag limit may not exceed 5 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Experimental Seasons

An experimental Canada goose season of up to 12 consecutive days during September 16–27 may be selected by South Dakota. The daily bag limit may not exceed 5 Canada geese.

An experimental Canada goose season of up to 9 consecutive days during September 22–30 may be selected by Oklahoma. The daily bag limit may not exceed 5 Canada geese.

Pacific Flyway

General Seasons

California may select a 9-day season in Humboldt County during the period September 1–15. The daily bag limit is 2.

Colorado may select a 9-day season during the period of September 1–15. The daily bag limit is 3.

Oregon may select a special Canada goose season of up to 15 days during the period September 1–15. In addition, in the NW goose management zone in Oregon, a 15-day season may be selected during the period September 1–20. Daily bag limits may not exceed 5 Canada geese.

Idaho may select a 7-day season in the special East Canada Goose Zone, as described in State regulations, during the period September 1–15. All participants must have a valid State permit, and the total number of permits issued is not to exceed 110 for this zone. The daily bag limit is 2.

Idaho may select a 7-day Canada goose season during the period September 1–15 in Nez Perce County, with a bag limit of 4.

Washington may select a special Canada goose season of up to 15 days during the period September 1–15. Daily bag limits may not exceed 5 Canada geese.

Wyoming may select an 8-day season on Canada geese between September 1–15. This season is subject to the following conditions:

1. Where applicable, the season must be concurrent with the September portion of the sandhill crane season.

2. All participants must have a valid State permit for the special season.

3. A daily bag limit of 3, with season and possession limits of 6, will apply to the special season.

Areas open to hunting of Canada geese in each State must be described, delineated, and designated as such in each State's hunting regulations.

Regular Goose Seasons

Regular goose seasons may open as early as September 16 in Wisconsin and Michigan. Season lengths, bag and possession limits, and other provisions will be established during the late-season regulations process.

Sandhill Cranes

Regular Seasons in the Central Flyway:

Outside Dates: Between September 1 and February 28.

Hunting Seasons: Seasons not to exceed 37 consecutive days may be selected in designated portions of North Dakota (Area 2) and Texas (Area 2). Seasons not to exceed 58 consecutive days may be selected in designated portions of the following States: Colorado, Kansas, Montana, North Dakota, South Dakota, and Wyoming. Seasons not to exceed 93 consecutive days may be selected in designated portions of the following States: New Mexico, Oklahoma, and Texas.

Daily Bag Limits: 3 sandhill cranes, except 2 sandhill cranes in designated portions of North Dakota (Area 2) and Texas (Area 2).

Permits: Each person participating in the regular sandhill crane seasons must have a valid Federal sandhill crane hunting permit and/or, in those States where a Federal sandhill crane permit is not issued, a State-issued Harvest Information Survey Program (HIP) certification for game bird hunting in their possession while hunting.

Special Seasons in the Central and Pacific Flyways:

Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming may select seasons for hunting sandhill cranes within the range of the Rocky Mountain Population (RMP) subject to the following conditions:

Outside Dates: Between September 1 and January 31.

Hunting Seasons: The season in any State or zone may not exceed 30 days.

Bag Limits: Not to exceed 3 daily and 9 per season.

Permits: Participants must have a valid permit, issued by the appropriate State, in their possession while hunting.

Other Provisions: Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with the management plan and approved by the *Central and Pacific Flyway Councils with the following exceptions:*

1. In Utah, the requirement for monitoring the racial composition of the harvest in the experimental season is waived, and 100 percent of the harvest will be assigned to the RMP quota;

2. In Arizona, the annual requirement for monitoring the racial composition of the harvest is changed to once every 3 years;

3. In Idaho, seasons are experimental, and the requirement for monitoring the racial composition of the harvest is waived; 100 percent of the harvest will be assigned to the RMP quota; and

4. In New Mexico, the season in the Estancia Valley is experimental, with a requirement to monitor the level and racial composition of the harvest; greater sandhill cranes in the harvest will be assigned to the RMP quota.

Common Moorhens and Purple Gallinules

Outside Dates: Between September 1 and January 20 in the Atlantic Flyway, and between September 1 and the Sunday nearest January 20 (January 18) in the Mississippi and Central Flyways. States in the Pacific Flyway have been allowed to select their hunting seasons between the outside dates for the season on ducks; therefore, they are late-season frameworks, and no frameworks are provided in this document.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 70 days in the Atlantic, Mississippi, and Central Flyways. Seasons may be split into 2 segments. The daily bag limit is 15 common moorhens and purple gallinules, singly or in the aggregate of the two species.

Zoning: Seasons may be selected by zones established for duck hunting.

Rails

Outside Dates: States included herein may select seasons between September 1 and January 20 on clapper, king, sora, and Virginia rails.

Hunting Seasons: The season may not exceed 70 days, and may be split into 2 segments.

Daily Bag Limits:

Clapper and King Rails—In Rhode Island, Connecticut, New Jersey, Delaware, and Maryland, 10, singly or in the aggregate of the two species. In Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Virginia, 15, singly or in the aggregate of the two species.

Sora and Virginia Rails—In the Atlantic, Mississippi, and Central Flyways and the Pacific-Flyway portions of Colorado, Montana, New Mexico, and Wyoming, 25 daily and 25 in possession, singly or in the aggregate of the two species. The season is closed in the remainder of the Pacific Flyway.

Common Snipe

Outside Dates: Between September 1 and February 28, except in Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, and Virginia, where the season must end no later than January 31.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 107 days and may be split into two segments. The daily bag limit is 8 snipe.

Zoning: Seasons may be selected by zones established for duck hunting.

American Woodcock

Outside Dates: States in the Eastern Management Region may select hunting

seasons between October 1 and January 31. States in the Central Management Region may select hunting seasons between the Saturday nearest September 22 (September 20) and January 31.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 30 days in the Eastern Region and 45 days in the Central Region. The daily bag limit is 3. Seasons may be split into two segments.

Zoning: New Jersey may select seasons in each of two zones. The season in each zone may not exceed 24 days.

Band-tailed Pigeons

Pacific Coast States (California, Oregon, Washington, and Nevada)

Outside Dates: Between September 15 and January 1.

Hunting Seasons and Daily Bag Limits: Not more than 9 consecutive days, with a daily bag limit of 2 band-tailed pigeons.

Zoning: California may select hunting seasons not to exceed 9 consecutive days in each of two zones. The season in the North Zone must close by October 3.

Four-Corners States (Arizona, Colorado, New Mexico, and Utah)

Outside Dates: Between September 1 and November 30.

Hunting Seasons and Daily Bag Limits: Not more than 30 consecutive days, with a daily bag limit of 5 band-tailed pigeons.

Zoning: New Mexico may select hunting seasons not to exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

Mourning Doves

Outside Dates: Between September 1 and January 15, except as otherwise provided, States may select hunting seasons and daily bag limits as follows:

Eastern Management Unit

Hunting Seasons and Daily Bag Limits: Not more than 70 days with a daily bag limit of 12, or not more than 60 days with a daily bag limit of 15.

Zoning and Split Seasons: States may select hunting seasons in each of two zones. The season within each zone may be split into not more than three periods. The hunting seasons in the South Zones of Alabama, Florida, Georgia, and Louisiana, may commence no earlier than September 20. Regulations for bag and possession limits, season length, and shooting hours must be uniform within specific hunting zones.

Central Management Unit

Hunting Seasons and Daily Bag Limits: Not more than 70 days with a daily bag limit of 12, or not more than 60 days with a daily bag limit of 15 mourning and white-winged doves in the aggregate.

Zoning and Split Seasons:

States may select hunting seasons in each of two zones. The season within each zone may be split into not more than three periods.

Texas may select hunting seasons for each of three zones subject to the following conditions:

A. The hunting season may be split into not more than two periods, except in that portion of Texas in which the special white-winged dove season is allowed, where a limited mourning dove season may be held concurrently with that special season (see white-winged dove frameworks).

B. A season may be selected for the North and Central Zones between September 1 and January 25; and for the South Zone between September 20 and January 25.

C. Daily bag limits are aggregate bag limits with mourning, white-winged, and white-tipped doves (see white-winged dove frameworks for specific daily bag limit restrictions).

D. Except as noted above, regulations for bag and possession limits, season length, and shooting hours must be uniform within each hunting zone.

Western Management Unit

Hunting Seasons and Daily Bag Limits:

Idaho, Oregon, Utah, and Washington—Not more than 30 consecutive days with a daily bag limit of 10 mourning doves.

Nevada—Not more than 30 consecutive days with a daily bag limit of 10 mourning doves, except in Clark and Nye Counties where the daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate.

Arizona and California—Not more than 60 days, which may be split between two periods, September 1–15 and November 1–January 15. In Arizona, during the first segment of the season, the daily bag limit is 10 mourning and white-winged doves in the aggregate, of which no more than 6 may be white-winged doves. During the remainder of the season, the daily bag limit is 10 mourning doves. In California, the daily bag limit is 10 mourning doves, except in Imperial, Riverside, and San Bernardino Counties where the daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate.

White-winged and White-tipped Doves

Hunting Seasons and Daily Bag Limits:

Except as shown below, seasons must be concurrent with mourning dove seasons.

Eastern Management Unit:

In Florida, the daily bag limit may not exceed 12 mourning and white-winged doves (15 under the alternative) in the aggregate, of which no more than 4 may be white-winged doves.

In the remainder of the Eastern Management Unit, the season is closed.

Central Management Unit:

In Texas, the daily bag limit may not exceed 12 mourning, white-winged, and white-tipped doves (15 under the alternative) in the aggregate, of which no more than 2 may be white-tipped doves. In addition, Texas also may select a hunting season of not more than 4 days for the special white-winged dove area of the South Zone between September 1 and September 19. The daily bag limit may not exceed 10 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 5 may be mourning doves and 2 may be white-tipped doves.

In the remainder of the Central Management Unit, the daily bag limit may not exceed 12 (15 under the alternative) mourning and white-winged doves in the aggregate.

Western Management Unit:

Arizona may select a hunting season of not more than 30 consecutive days, running concurrently with the first segment of the mourning dove season. The daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate, of which no more than 6 may be white-winged doves.

In the Nevada Counties of Clark and Nye, and in the California Counties of Imperial, Riverside, and San Bernardino, the daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate.

In the remainder of the Western Management Unit, the season is closed.

Alaska

Outside Dates: Between September 1 and January 26.

Hunting Seasons: Alaska may select 107 consecutive days for waterfowl, sandhill cranes, and common snipe in each of five zones. The season may be split without penalty in the Kodiak Zone. The seasons in each zone must be concurrent.

Closures: The season is closed on Canada geese from Unimak Pass westward in the Aleutian Island chain. The hunting season is closed on emperor geese, spectacled eiders, and Steller's eiders.

Daily Bag and Possession Limits:

Ducks—Except as noted, a basic daily bag limit of 7 and a possession limit of 21 ducks. Daily bag and possession limits in the North Zone are 10 and 30, and in the Gulf Coast Zone, they are 8 and 24, respectively. The basic limits may include no more than 1 canvasback daily and 3 in possession and may not include sea ducks.

In addition to the basic duck limits, Alaska may select sea duck limits of 10 daily, 20 in possession, singly or in the aggregate, including no more than 6 each of either harlequin or long-tailed ducks. Sea ducks include scoters, common and king eiders, harlequin ducks, long-tailed ducks, and common and red-breasted mergansers.

Light Geese—A basic daily bag limit of 3 and a possession limit of 6.

Dark Geese—A basic daily bag limit of 4 and a possession limit of 8.

Dark-goose seasons are subject to the following exceptions:

1. In Units 5 and 6, the taking of Canada geese is permitted from September 28 through December 16. A special, permit-only Canada goose season may be offered on Middleton Island. No more than 10 permits can be issued. A mandatory goose identification class is required. Hunters must check in and check out. The bag limit is 1 daily and 1 in possession. The season will close if incidental harvest includes 5 dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value five or less) with a bill length between 40 and 50 millimeters.

2. In Unit 10 (except Unimak Island), the taking of Canada geese is prohibited.

3. In Unit 9(D) and the Unimak Island portion of Unit 10, the limits for dark geese are 6 daily and 12 in possession.

Brant—A daily bag limit of 2.

Common snipe—A daily bag limit of 8.

Sandhill cranes—Bag and possession limits of 2 and 4, respectively, in the Southeast, Gulf Coast, Kodiak, and Aleutian Zones, and Unit 17 in the Northern Zone. In the remainder of the Northern Zone (outside Unit 17), bag and possession limits of 3 and 6, respectively.

Tundra Swans—Open seasons for tundra swans may be selected subject to the following conditions:

1. All seasons are by registration permit only.

2. All season framework dates are September 1—October 31.

3. In Game Management Unit (GMU) 17, an experimental season may be selected. No more than 200 permits may be issued for this during the experimental season. No more than 3 tundra swans may be authorized per permit with no more than 1 permit issued per hunter per season. An evaluation of the season must be completed, adhering to the guidelines for experimental seasons as described in the Pacific Flyway Management Plan for the Western Population of (tundra) Swans.

4. In Game Management Unit (GMU) 18, no more than 500 permits may be issued during the operational season. Up to 3 tundra swans may be authorized per permit. No more than 1 permit may be issued per hunter per season.

5. In GMU 22, no more than 300 permits may be issued during the operational season. Each permittee may be authorized to take up to 3 tundra swan per permit. No more than 1 permit may be issued per hunter per season.

6. In GMU 23, no more than 300 permits may be issued during the operational season. No more than 3 tundra swans may be authorized per permit with no more than 1 permit issued per hunter per season.

Hawaii

Outside Dates: Between October 1 and January 31.

Hunting Seasons: Not more than 65 days (75 under the alternative) for mourning doves.

Bag Limits: Not to exceed 15 (12 under the alternative) mourning doves.

Note: Mourning doves may be taken in Hawaii in accordance with shooting hours and other regulations set by the State of Hawaii, and subject to the applicable provisions of 50 CFR part 20.

Puerto Rico

Doves and Pigeons:

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days.

Daily Bag and Possession Limits: Not to exceed 15 Zenaida, mourning, and white-winged doves in the aggregate, of which not more than 3 may be mourning doves. Not to exceed 5 scaly-naped pigeons.

Closed Areas: There is no open season on doves or pigeons in the following areas: Municipality of Culebra, Desecheo Island, Mona Island, El Verde Closure Area, and Cidra Municipality and adjacent areas.

Ducks, Coots, Moorhens, Gallinules, and Snipe:

Outside Dates: Between October 1 and January 31.

Hunting Seasons: Not more than 55 days may be selected for hunting ducks, common moorhens, and common snipe. The season may be split into two segments.

Daily Bag Limits:

Ducks—Not to exceed 6.

Common moorhens—Not to exceed 6.

Common snipe—Not to exceed 8.

Closed Seasons: The season is closed on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck, which are protected by the Commonwealth of Puerto Rico. The season also is closed on the purple gallinule, American coot, and Caribbean coot.

Closed Areas: There is no open season on ducks, common moorhens, and common snipe in the Municipality of Culebra and on Desecheo Island.

Virgin Islands

Doves and Pigeons:

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days for Zenaida doves.

Daily Bag and Possession Limits: Not to exceed 10 Zenaida doves.

Closed Seasons: No open season is prescribed for ground or quail doves, or pigeons in the Virgin Islands.

Closed Areas: There is no open season for migratory game birds on Ruth Cay (just south of St. Croix).

Local Names for Certain Birds: Zenaida dove, also known as mountain dove; bridled quail-dove, also known as Barbary dove or partridge; Common ground-dove, also known as stone dove, tobacco dove, rola, or tortolita; scaly-naped pigeon, also known as red-necked or scaled pigeon.

Ducks

Outside Dates: Between December 1 and January 31.

Hunting Seasons: Not more than 55 consecutive days.

Daily Bag Limits: Not to exceed 6.

Closed Seasons: The season is closed on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck.

Special Falconry Regulations

Falconry is a permitted means of taking migratory game birds in any State meeting Federal falconry standards in 50 CFR 21.29(k). These States may select an extended season for taking migratory game birds in accordance with the following:

Extended Seasons: For all hunting methods combined, the combined length of the extended season, regular season, and any special or experimental seasons must not exceed 107 days for any species or group of species in a geographical area. Each extended season may be divided into a maximum of 3 segments.

Framework Dates: Seasons must fall between September 1 and March 10.

Daily Bag and Possession Limits: Falconry daily bag and possession limits for all permitted migratory game birds must not exceed 3 and 6 birds, respectively, singly or in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in all States, including those that do not select an extended falconry season.

Regular Seasons: General hunting regulations, including seasons and hunting hours, apply to falconry in each State listed in 50 CFR 21.29(k). Regular-season bag and possession limits do not apply to falconry. The falconry bag limit is not in addition to gun limits.

Area, Unit, and Zone Descriptions

Mourning and White-winged Doves

Alabama

South Zone—Baldwin, Barbour, Coffee, Conecuh, Covington, Dale, Escambia, Geneva, Henry, Houston, and Mobile Counties.

North Zone—Remainder of the State.

California

White-winged Dove Open Areas—Imperial, Riverside, and San Bernardino Counties.

Florida

Northwest Zone—The Counties of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, Washington, Leon (except that portion north of U.S. 27 and east of State Road 155), Jefferson (south of U.S. 27, west of State Road 59 and north of U.S. 98), and Wakulla (except that portion south of U.S. 98 and east of the St. Marks River).

South Zone—Remainder of State.

Georgia

Northern Zone—That portion of the State lying north of a line running west to east along U.S. Highway 280 from Columbus to Wilcox County, thence southward along the western border of Wilcox County; thence east along the southern border of Wilcox County to the Ocmulgee River, thence north along the Ocmulgee River to Highway 280, thence east along Highway 280 to the Little Ocmulgee River; thence southward along the Little Ocmulgee River to the Ocmulgee River; thence southwesterly along the Ocmulgee River to the western border of Jeff Davis County; thence south along the western border of Jeff Davis County; thence east along the southern border of Jeff Davis and Appling Counties; thence north along the eastern border of Appling County, to the Altamaha River; thence east to the eastern border of Tattnall County; thence north along the eastern border of Tattnall County; thence north along the western border of Evans to Candler County; thence east along the northern border of Evans County to U.S. Highway 301; thence northeast along U.S. Highway 301 to the South Carolina line.

South Zone—Remainder of the State.

Louisiana

North Zone—That portion of the State north of Interstate Highway 10 from the Texas State line to Baton Rouge, Interstate Highway 12 from Baton Rouge to Slidell and Interstate Highway 10 from Slidell to the Mississippi State line.

South Zone—The remainder of the State.

Nevada

White-winged Dove Open Areas—Clark and Nye Counties.

Texas

North Zone—That portion of the State north of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to TX 20; west along TX 20 to TX 148; north along TX 148 to I–10 at Fort Hancock; east along I–10 to I–20; northeast along I–20 to I–30 at Fort Worth; northeast along I–30 to the Texas-Arkansas State line.

South Zone—That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to San Antonio; then east on I–10 to Orange, Texas.

Special White-winged Dove Area in the South Zone—That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to Uvalde; south on U.S. 83 to TX 44; east along TX 44 to TX 16 at Freer; south along TX 16 to TX 285 at Hebbronville; east along TX 285 to FM 1017; southwest along FM 1017 to TX 186 at Linn; east along TX 186 to the Mansfield Channel at Port Mansfield; east along the Mansfield Channel to the Gulf of Mexico.

Area with additional restrictions—Cameron, Hidalgo, Starr, and Willacy Counties.

Central Zone—That portion of the State lying between the North and South Zones.

Band-tailed Pigeons

California

North Zone—Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity Counties.

South Zone—The remainder of the State.

New Mexico

North Zone—North of a line following U.S. 60 from the Arizona State line east to I–25 at Socorro and then south along I–25 from Socorro to the Texas State line.

South Zone—Remainder of the State.

Washington

Western Washington—The State of Washington excluding those portions lying east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

Woodcock

New Jersey

North Zone—That portion of the State north of NJ 70.

South Zone—The remainder of the State.

Special September Canada Goose Seasons

Atlantic Flyway

Connecticut

North Zone—That portion of the State north of I–95.

South Zone—Remainder of the State.

Maryland

Eastern Unit—Anne Arundel, Calvert, Caroline, Cecil, Charles, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties, and those portions of Baltimore, Howard, and Prince George's Counties east of I–95.

Western Unit—Allegany, Carroll, Frederick, Garrett, Montgomery, and Washington Counties, and those portions of Baltimore, Howard, and Prince George's Counties west of I–95.

Massachusetts

Western Zone—That portion of the State west of a line extending south from the Vermont border on I–91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut border.

Central Zone—That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire border on I–95 to U.S. 1, south on U.S. 1 to I–93, south on I–93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I–195, west to the Rhode Island border; except the waters, and the lands 150 yards inland from the high-water mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center St.-Elm St. bridge will be in the Coastal Zone.

Coastal Zone—That portion of Massachusetts east and south of the Central Zone.

New York

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Long Island Zone—That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I–95, and their tidal waters.

Western Zone—That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, and south along I–81 to the Pennsylvania border, except for the Montezuma Zone.

Montezuma Zone—Those portions of Cayuga, Seneca, Ontario, Wayne, and Oswego Counties north of U.S. Route 20, east of NYS Route 14, south of NYS Route 104, and west of NYS Route 34.

Northeastern Zone—That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, south along I–81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I–87, north along I–87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone—The remaining portion of New York.

North Carolina

Northeast Hunt Unit—Counties of Bertie, Camden, Chowan, Currituck, Dare, Hyde, Pasquotank, Perquimans, Tyrrell, and Washington.

Vermont

Lake Champlain Zone: The U.S. portion of Lake Champlain and that area north and west of the line extending from the New York border along U.S. 4 to VT 22A at Fair Haven; VT 22A to U.S. 7 at Vergennes; U.S. 7 to the Canadian border.

Interior Zone: That portion of Vermont west of the Lake Champlain Zone and eastward of a line extending from the Massachusetts border at Interstate 91; north along Interstate 91 to U.S. 2; east along U.S. 2 to VT 102; north along VT 102 to VT 253; north along VT 253 to the Canadian border.

Connecticut River Zone: The remaining portion of Vermont east of the Interior Zone.

Mississippi Flyway

Illinois

Northeast Canada Goose Zone—Cook, Du Page, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, and Will Counties.

North Zone: That portion of the State outside the Northeast Canada Goose Zone and north of a line extending east from the Iowa border along Illinois Highway 92 to Interstate Highway 280, east along I–280 to I–80, then east along I–80 to the Indiana border.

Central Zone: That portion of the State outside the Northeast Canada Goose Zone and south of the North Zone to a line extending east from the Missouri border along the Modoc Ferry route to Modoc Ferry Road, east along Modoc Ferry Road to Modoc Road, northeasterly along Modoc Road and St. Leo's Road to Illinois Highway 3, north along Illinois 3 to Illinois 159, north along Illinois 159 to Illinois 161, east along Illinois 161 to Illinois 4, north along Illinois 4 to Interstate Highway 70, east along I–70 to the Bond County line, north and east along the Bond County line to Fayette County, north and east along the Fayette County line to Effingham County, east and south along the Effingham County line to I–70, then east along I–70 to the Indiana border.

South Zone: The remainder of Illinois.

Iowa

North Zone: That portion of the State north of a line extending east from the Nebraska border along State Highway 175 to State 37, southeast along State 37 to U.S. Highway 59, south along U.S. 59 to Interstate Highway 80, then east along I–80 to the Illinois border.

South Zone: The remainder of Iowa.

Michigan

North Zone: The Upper Peninsula.

Middle Zone: That portion of the Lower Peninsula north of a line beginning at the Wisconsin border in Lake Michigan due west of the mouth of Stony Creek in Oceana County; then due east to, and easterly and southerly along the south shore of, Stony Creek to Scenic Drive, easterly and southerly along Scenic Drive to Stony Lake Road, easterly along Stony Lake and Garfield Roads to Michigan Highway 20, east along Michigan 20 to U.S. Highway 10 Business Route (BR) in the city of Midland, east along U.S. 10 BR to U.S. 10, east along U.S. 10 to Interstate Highway 75/U.S. Highway 23, north along I–75/U.S. 23 to the U.S. 23 exit at Standish, east along U.S. 23 to Shore Road in Arenac County, east along Shore Road to the tip of Point Lookout, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canada border.

South Zone: The remainder of Michigan.

Minnesota

Twin Cities Metropolitan Canada Goose Zone—

A. All of Hennepin and Ramsey Counties.

B. In Anoka County, all of Columbus Township lying south of County State Aid Highway (CSAH) 18, Anoka County; all of the cities of Ramsey, Andover, Anoka, Coon Rapids, Spring Lake Park, Fridley, Hilltop, Columbia Heights, Blaine, Lexington, Circle Pines, Lino Lakes, and Centerville; and all of the city of Ham Lake except that portion lying north of CSAH 18 and east of U.S. Highway 65.

C. That part of Carver County lying north and east of the following described line: Beginning at the northeast corner of San Francisco Township; thence west along the north boundary of San Francisco Township to the east boundary of Dahlgren Township; thence north along the east boundary of Dahlgren Township to U.S. Highway 212; thence west along U.S. Highway 212 to State Trunk Highway (STH) 284; thence north on STH 284 to County State Aid Highway (CSAH) 10; thence north and west on CSAH 10 to CSAH 30; thence north and west on CSAH 30 to STH 25; thence east and north on STH 25 to CSAH 10; thence north on CSAH 10 to the Carver County line.

D. In Scott County, all of the cities of Shakopee, Savage, Prior Lake, and Jordan, and all of the Townships of Jackson, Louisville, St. Lawrence, Sand Creek, Spring Lake, and Credit River.

E. In Dakota County, all of the cities of Burnsville, Eagan, Mendota Heights, Mendota, Sunfish Lake, Inver Grove Heights, Apple Valley, Lakeville, Rosemount, Farmington, Hastings, Lilydale, West St. Paul, and South St. Paul, and all of the Township of Nininger.

F. That portion of Washington County lying south of the following described line: Beginning at County State Aid Highway (CSAH) 2 on the west boundary of the county; thence east on CSAH 2 to U.S. Highway 61; thence south on U.S. Highway 61 to State Trunk Highway (STH) 97; thence east on STH 97 to the intersection of STH 97 and STH 95; thence due east to the east boundary of the State.

Northwest Goose Zone—That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Southeast Goose Zone—That part of the State within the following described boundaries: beginning at the intersection of U.S. Highway 52 and the south boundary of the Twin Cities Metro Canada Goose Zone; thence along the U.S. Highway 52 to State Trunk Highway (STH) 57; thence along STH 57 to the municipal boundary of Kasson; thence along the municipal boundary of Kasson County State Aid Highway (CSAH) 13, Dodge County; thence along CSAH 13 to STH 30; thence along STH 30 to U.S. Highway 63; thence along U.S. Highway 63 to the south boundary of the State; thence along the south and east boundaries of the State to the south boundary of the Twin Cities Metro Canada Goose Zone; thence along said boundary to the point of beginning.

Five Goose Zone—That portion of the State not included in the Twin Cities Metropolitan Canada Goose Zone, the Northwest Goose Zone, or the Southeast Goose Zone.

West Zone—That portion of the State encompassed by a line beginning at the junction of State Trunk Highway (STH) 60 and the Iowa border, then north and east along STH 60 to U.S. Highway 71, north along U.S. 71 to Interstate Highway 94, then north and west along I–94 to the North Dakota border.

Tennessee

Middle Tennessee Zone—Those portions of Houston, Humphreys, Montgomery, Perry, and Wayne Counties east of State Highway 13; and Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Hickman, Lawrence, Lewis, Lincoln, Macon, Marshall, Maury, Moore, Robertson, Rutherford, Smith, Sumner, Trousdale, Williamson, and Wilson Counties.

East Tennessee Zone—Anderson, Bledsoe, Bradley, Blount, Campbell, Carter, Claiborne, Clay, Cocke, Cumberland, DeKalb, Fentress, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, Jackson, Jefferson, Johnson, Knox, Loudon, Marion, McMinn, Meigs, Monroe, Morgan, Overton, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Unicoi, Union, Van Buren, Warren, Washington, and White Counties.

Wisconsin

Early-Season Subzone A—That portion of the State encompassed by a line beginning at the intersection of U.S. Highway 141 and the Michigan border near Niagara, then south along U.S. 141 to State Highway 22, west and southwest along State 22 to U.S. 45, south along U.S. 45 to State 22, west and south along State 22 to State 110, south along State 110 to U.S. 10, south along U.S. 10 to State 49, south along State 49 to State 23, west along State 23 to State 73, south along State 73 to State 60, west along State 60 to State 23, south along State 23 to State 11, east along State 11 to State 78, then south along State 78 to the Illinois border.

Early-Season Subzone B—The remainder of the State.

Central Flyway

Kansas

September Canada Goose Kansas City/Topeka Unit—That part of Kansas bounded by a line from the Kansas-Missouri State line west on K–68 to its junction with K–33, then north on K–33 to its junction with U.S. 56, then west on U.S. 56 to its junction with K–31, then west-northwest on K–31 to its junction with K–99, then north on K–99 to its junction with U.S. 24, then east on U.S. 24 to its junction with K–63, then north on K–63 to its junction with K–16, then east on K–16 to its junction with K–116, then east on K–116 to its junction with U.S. 59, then northeast on U.S. 59 to its junction with the Kansas-Missouri line, then south on the Kansas-Missouri line to its junction with K–68.

September Canada Goose Wichita Unit—That part of Kansas bounded by a line from I–135 west on U.S. 50 to its junction with Burmac Road, then south on Burmac Road to its junction with 279 Street West (Sedgwick/Harvey County line), then south on 279 Street West to its junction with K–96, then east on K–96 to its junction with K–296, then south on K–296 to its junction with 247 Street West, then south on 247 Street West to its junction with U.S. 54, then west on U.S. 54 to its junction with 263 Street West, then south on 263 Street West to its junction with K–49, then south on K–49 to its junction with 90 Avenue North, then east on 90 Avenue North to its junction with KS–55, then east on KS–55 to its junction with KS–15, then east on KS–15 to its junction with U.S. 77, then north on U.S. 77 to its junction with Ohio Street, then north on Ohio to its junction with KS–254, then east on KS–254 to its junction with KS–196, then northwest on KS–196 to its junction with I–135, then north on I–135 to its junction with U.S. 50.

South Dakota

September Canada Goose North Unit—Clark, Codington, Day, Deuel, Grant, Hamlin, Marshall, and Roberts Counties.

September Canada Goose South Unit—Beadle, Brookings, Hanson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, and Turner Counties,

Pacific Flyway

Idaho

East Zone—Bonneville, Caribou, Fremont, and Teton Counties.

Oregon

Northwest Zone—Benton, Clackamas, Clatsop, Columbia, Lane, Lincoln, Linn, Marion, Polk, Multnomah, Tillamook, Washington, and Yamhill Counties.

Southwest Zone—Coos, Curry, Douglas, Jackson, Josephine, and Klamath Counties.

East Zone—Baker, Gilliam, Malheur, Morrow, Sherman, Umatilla, Union, and Wasco Counties.

Washington

Area 1—Skagit, Island, and Snohomish Counties.

Area 2A (SW Quota Zone)—Clark County, except portions south of the Washougal River; Cowlitz, and Wahkiakum counties.

Area 2B (SW Quota Zone)—Pacific and Grays Harbor counties.

Area 3—All areas west of the Pacific Crest Trail and west of the Big White Salmon River that are not included in Areas 1, 2A, and 2B.

Area 4—Adams, Benton, Chelan, Douglas, Franklin, Grant, Kittitas, Lincoln, Okanogan, Spokane, and Walla Walla Counties.

Area 5—All areas east of the Pacific Crest Trail and east of the Big White Salmon River that are not included in Area 4.

Wyoming

Bear River Area—That portion of Lincoln County described in State regulations.

Salt River Area—That portion of Lincoln County described in State regulations.

Farson-Eden Area—Those portions of Sweetwater and Sublette Counties described in State regulations.

Teton Area—Those portions of Teton County described in State regulations.

Bridger Valley Area—The area described as the Bridger Valley Hunt Unit in State regulations.

Little Snake River—That portion of the Little Snake River drainage in Carbon County.

Ducks

Atlantic Flyway

New York

Lake Champlain Zone: The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Long Island Zone: That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I–95, and their tidal waters.

Western Zone: That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, and south along I–81 to the Pennsylvania border.

Northeastern Zone: That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, south along I–81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I–87, north along I–87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone: The remaining portion of New York.

Mississippi Flyway

Indiana

North Zone: That portion of the State north of a line extending east from the Illinois border along State Road 18 to U.S. Highway 31, north along U.S. 31 to U.S. 24, east along U.S. 24 to Huntington, then southeast along U.S. 224 to the Ohio border.

Ohio River Zone: That portion of the State south of a line extending east from the Illinois border along Interstate Highway 64 to New Albany, east along State Road 62 to State 56, east along State 56 to Vevay, east and north on State 156 along the Ohio River to North Landing, north along State 56 to U.S. Highway 50, then northeast along U.S. 50 to the Ohio border.

South Zone: That portion of the State between the North and Ohio River Zone boundaries.

Iowa

North Zone: That portion of the State north of a line extending east from the Nebraska border along State Highway 175 to State 37, southeast along State 37 to U.S. Highway 59, south along U.S. 59 to Interstate Highway 80, then east along I–80 to the Illinois border.

South Zone: The remainder of Iowa.

Central Flyway

Colorado

Special Teal Season Area: Lake and Chaffee Counties and that portion of the State east of Interstate Highway 25.

Kansas

High Plains Zone: That portion of the State west of U.S. 283.

Low Plains Early Zone: That portion of the State east of the High Plains Zone and west of a line extending south from the Nebraska border along KS 28 to U.S. 36, east along U.S. 36 to KS 199, south along KS 199 to Republic County Road 563, south along Republic County Road 563 to KS 148, east along KS 148 to Republic County Road 138, south along Republic County Road 138 to Cloud County Road 765, south along Cloud County Road 765 to KS 9, west along KS 9 to U.S. 24, west along U.S. 24 to U.S. 281, north along U.S. 281 to U.S. 36, west along U.S. 36 to U.S. 183, south along U.S. 183 to U.S. 24, west along U.S. 24 to KS 18, southeast along KS 18 to U.S. 183, south along U.S. 183 to KS 4, east along KS 4 to I–135, south along I–135 to KS 61, southwest along KS 61 to KS 96, northwest on KS 96 to U.S. 56, west along U.S. 56 to U.S. 281, south along U.S. 281 to U.S. 54, then west along U.S. 54 to U.S. 283.

Low Plains Late Zone: The remainder of Kansas.

Nebraska

Special Teal Season Area: That portion of the State south of a line beginning at the Wyoming State line; east along U.S. 26 to Nebraska Highway L62A; east to U.S. 385; south to U.S. 26; east to NE 92; east along NE 92 to NE 61; south along NE 61 to U.S. 30; east along U.S. 30 to the Iowa border.

New Mexico (Central Flyway Portion)

North Zone: That portion of the State north of I–40 and U.S. 54.

South Zone: The remainder of New Mexico.

Pacific Flyway

California

Northeastern Zone: In that portion of California lying east and north of a line beginning at the intersection of the Klamath River with the California-Oregon line; south and west along the Klamath River to the mouth of Shovel Creek; along Shovel Creek to its intersection with Forest Service Road 46N05 at Burnt Camp; west to its junction with Forest Service Road 46N10; south and east to its Junction with County Road 7K007; south and west to its junction with Forest Service Road 45N22; south and west to its junction with Highway 97 and Grass Lake Summit; south along to its junction with Interstate 5 at the town of Weed; south to its junction with Highway 89; east and south along Highway 89 to Main Street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada state line; north along the California-Nevada state line to the junction of the California-Nevada-Oregon state lines west along the California-Oregon state line to the point of origin.

Colorado River Zone: Those portions of San Bernardino, Riverside, and Imperial Counties east of a line extending from the Nevada border south along U.S. 95 to Vidal Junction; south on a road known as ''Aqueduct Road'' in San Bernardino County through the town of Rice to the San Bernardino-Riverside County line; south on a road known in Riverside County as the ''Desert Center to Rice Road'' to the town of Desert Center; east 31 miles on I–10 to the Wiley Well Road; south on this road to Wiley Well; southeast along the Army-Milpitas Road to the Blythe, Brawley, Davis Lake intersections; south on the Blythe-Brawley paved road to the Ogilby and Tumco Mine Road; south on this road to U.S. 80; east 7 miles on U.S. 80 to the Andrade-Algodones Road; south on this paved road to the Mexican border at Algodones, Mexico.

Southern Zone: That portion of southern California (but excluding the Colorado River Zone) south and east of a line extending from the Pacific Ocean east along the Santa Maria River to CA 166 near the City of Santa Maria; east on CA 166 to CA 99; south on CA 99 to the

crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to CA 178 at Walker Pass; east on CA 178 to U.S. 395 at the town of Inyokern; south on U.S. 395 to CA 58; east on CA 58 to I–15; east on I–15 to CA 127; north on CA 127 to the Nevada border.

Southern San Joaquin Valley Temporary Zone: All of Kings and Tulare Counties and that portion of Kern County north of the Southern Zone.

Balance-of-the-State Zone: The remainder of California not included in the Northeastern, Southern, and Colorado River Zones, and the Southern San Joaquin Valley Temporary Zone.

Canada Geese

Michigan

North Zone: The Upper Peninsula.

Middle Zone: That portion of the Lower Peninsula north of a line beginning at the Wisconsin border in Lake Michigan due west of the mouth of Stony Creek in Oceana County; then due east to, and easterly and southerly along the south shore of, Stony Creek to Scenic Drive, easterly and southerly along Scenic Drive to Stony Lake Road, easterly along Stony Lake and Garfield Roads to Michigan Highway 20, east along Michigan 20 to U.S. Highway 10 Business Route (BR) in the city of Midland, east along U.S. 10 BR to U.S. 10, east along U.S. 10 to Interstate Highway 75/U.S. Highway 23, north along I–75/U.S. 23 to the U.S. 23 exit at Standish, east along U.S. 23 to Shore Road in Arenac County, east along Shore Road to the tip of Point Lookout, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canada border.

South Zone: The remainder of Michigan.

Sandhill Cranes

Central Flyway

Colorado—The Central Flyway portion of the State except the San Luis Valley (Alamosa, Conejos, Costilla, Hinsdale, Mineral, Rio Grande, and Saguache Counties east of the Continental Divide) and North Park (Jackson County).

Kansas—That portion of the State west of a line beginning at the Oklahoma border, north on I–35 to Wichita, north on I–135 to Salina, and north on U.S. 81 to the Nebraska border.

New Mexico

Regular-Season Open Area—Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.

Middle Rio Grande Valley Area—The Central Flyway portion of New Mexico in Socorro and Valencia Counties.

Estancia Valley Area—Those portions of Santa Fe, Torrance and Bernallilo Counties within an area bounded on the west by New Mexico Highway 55 beginning at Mountainair north to NM 337, north to NM 14, north to I–25; on the north by I–25 east to U.S. 285; on the east by U.S. 285 south to U.S. 60; and on the south by U.S. 60 from U.S. 285 west to NM 55 in Mountainair.

Southwest Zone—Sierra, Luna, Dona Ana Counties, and those portions of Grant and Hidalgo Counties south of I–10.

Oklahoma—That portion of the State west of I–35.

Texas

Area 1—That portion of the State west of a line beginning at the International Bridge at Laredo, north along I–35 to the Oklahoma border.

Area 2—That portion of the State east and south of a line from the International Bridge at Laredo northerly along I–35 to U.S. 290; southeasterly along U.S. 290 to I–45; south and east on I–45 to State Highway 87, south and east on TX 87 to the channel in the Gulf of Mexico between Galveston and Point Bolivar; EXCEPT: That portion of the State lying within the area bounded by the Corpus Christi Bay Causeway on U.S. 181 at Portland; north and west on U.S. 181 to U.S. 77 at Sinton; north and east along U.S. 77 to U.S. 87 at Victoria; east and south along U.S. 87 to Texas Highway 35; north and east on TX 35 to the west end of the Lavaca Bay Bridge; then south and east along the west shoreline of Lavaca Bay and Matagorda Island to the Gulf of Mexico; then south and west along the shoreline of the Gulf of Mexico to the Corpus Christi Bay Causeway.

North Dakota

Area 1—That portion of the State west of U.S. 281.

Area 2—That portion of the State east of U.S. 281.

South Dakota—That portion of the State west of U.S. 281.

Montana—The Central Flyway portion of the State except that area south of I–90 and west of the Bighorn River.

Wyoming

Regular-Season Open Area—Campbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston Counties.

Riverton-Boysen Unit—Portions of Fremont County.

Park and Big Horn County Unit—Portions of Park and Big Horn Counties.

Pacific Flyway

Arizona

Special-Season Area—Game Management Units 30A, 30B, 31, and 32.

Montana

Special-Season Area—See State regulations.

Utah

Special-Season Area—Rich, Cache, and Unitah Counties and that portion of Box Elder County beginning on the Utah-Idaho State line at the Box Elder-Cache County line; west on the State line to the Pocatello Valley County Road; south on the Pocatello Valley County Road to I–15; southeast on I–15 to SR–83; south on SR–83 to Lamp Junction; west and south on the Promontory Point County Road to the tip of Promontory Point; south from Promontory Point to the Box Elder-Weber County line; east on the Box Elder-Weber County line to the Box Elder-Cache County line; north on the Box Elder-Cache County line to the Utah-Idaho State line.

Wyoming

Bear River Area—That portion of Lincoln County described in State regulations.

Salt River Area—That portion of Lincoln County described in State regulations.

Farson-Eden Area—Those portions of Sweetwater and Sublette Counties described in State regulations.

All Migratory Game Birds in Alaska

North Zone—State Game Management Units 11–13 and 17–26.

Gulf Coast Zone—State Game Management Units 5–7, 9, 14–16, and 10 (Unimak Island only).

Southeast Zone—State Game Management Units 1–4.

Pribilof and Aleutian Islands Zone—State Game Management Unit 10 (except Unimak Island).

Kodiak Zone—State Game Management Unit 8.

All Migratory Game Birds in the Virgin Islands

Ruth Cay Closure Area—The island of Ruth Cay, just south of St. Croix.

All Migratory Game Birds in Puerto Rico

Municipality of Culebra Closure Area—All of the municipality of Culebra.

Desecheo Island Closure Area—All of Desecheo Island.

Mona Island Closure Area—All of Mona Island.

El Verde Closure Area—Those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for 1 kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public.

Cidra Municipality and adjacent areas—All of Cidra Municipality and portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality boundary to the point of the beginning.

[FR Doc. 03–18096 Filed 7–16–03; 8:45 am]

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.access.gpo.gov/nara/nara005.html*. Some laws may not yet be available.

H.R. 825/P.L. 108–46

To redesignate the facility of the United States Postal Service located at 7401 West 100th Place in Bridgeview, Illinois, as the ''Michael J. Healy Post Office Building''. (July 14, 2003; 117 Stat. 847)

H.R. 917/P.L. 108–47

To designate the facility of the United States Postal Service located at 1830 South Lake Drive in Lexington, South Carolina, as the ''Floyd Spence Post Office Building''. (July 14, 2003; 117 Stat. 848)

H.R. 925/P.L. 108–48

To redesignate the facility of the United States Postal Service located at 1859 South Ashland Avenue in Chicago, Illinois, as the ''Cesar Chavez Post Office''. (July 14, 2003; 117 Stat. 849)

H.R. 981/P.L. 108–49

To designate the facility of the United States Postal Service located at 141 Erie Street in Linesville, Pennsylvania, as the ''James R. Merry Post Office''. (July 14, 2003; 117 Stat. 850)

H.R. 985/P.L. 108–50

To designate the facility of the United States Postal Service located at 111 West Washington Street in Bowling Green, Ohio, as the ''Delbert L. Latta Post Office Building''. (July 14, 2003; 117 Stat. 851)

H.R. 1055/P.L. 108–51

To designate the facility of the United States Postal Service located at 1901 West Evans Street in Florence, South Carolina, as the ''Dr. Roswell N. Beck Post Office Building''. (July 14, 2003; 117 Stat. 852)

H.R. 1368/P.L. 108–52

To designate the facility of the United States Postal Service located at 7554 Pacific Avenue in Stockton, California, as the ''Norman D. Shumway Post Office Building''. (July 14, 2003; 117 Stat. 853)

H.R. 1465/P.L. 108–53

To designate the facility of the United States Postal Service located at 4832 East Highway 27 in Iron Station, North Carolina, as the ''General Charles Gabriel Post Office''. (July 14, 2003; 117 Stat. 854)

H.R. 1596/P.L. 108–54

To designate the facility of the United States Postal Service located at 2318 Woodson Road in St. Louis, Missouri, as the ''Timothy Michael Gaffney Post Office Building''. (July 14, 2003; 117 Stat. 855)

H.R. 1609/P.L. 108–55

To redesignate the facility of the United States Postal Service located at 201 West Boston Street in Brookfield, Missouri, as the ''Admiral Donald Davis Post Office Building''. (July 14, 2003; 117 Stat. 856)

H.R. 1740/P.L. 108–56

To designate the facility of the United States Postal Service located at 1502 East Kiest Boulevard in Dallas, Texas, as the ''Dr. Caesar A.W. Clark, Sr. Post Office Building''. (July 14, 2003; 117 Stat. 857)

H.R. 2030/P.L. 108–57

To designate the facility of the United States Postal Service located at 120 Baldwin Avenue in Paia, Maui, Hawaii, as the ''Patsy Takemoto Mink Post Office Building''. (July 14, 2003; 117 Stat. 858)

H.R. 2474/P.L. 108–58

To authorize the Congressional Hunger Center to award Bill Emerson and Mickey Leland Hunger Fellowships for fiscal years 2003 and 2004. (July 14, 2003; 117 Stat. 859)

S. 858/P.L. 108–59

To extend the Abraham Lincoln Bicentennial Commission, and for other purposes. (July 14, 2003; 117 Stat. 860)

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